Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42785/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th October 2014	**On 9th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR C E W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Fisher, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Liberia born on 1st October 1976 and he appealed against a decision made by the respondent on 2nd October 2013 to refuse him a residence card as confirmation of a right to reside in the United Kingdom. In order to qualify for a retained right of residence following divorce from an EEA national in accordance with Regulation 10(5) of the Immigration (EEA) Regulations 2006, the respondent requested

    a. evidence that his EEA former spouse was exercising free movement rights in the United Kingdom at the time of the divorce;

b. evidence that his marriage lasted for three years and that he and his former spouse resided in the United Kingdom for at least one year during the marriage and

c. Evidence that he was in employment, self-employment or economically self-sufficient as if he were an EEA national at the date of divorce.

2. The appellant produced a decree absolute issued by the United Kingdom on 16th May 2007 and it was accepted that the marriage to the EEA national was dissolved.

3. The respondent specifically stated that further to Regulation 10(6) the appellant needed to provide evidence that since the date of his divorce he had been a worker, self-employed or self-sufficient. He supplied an employment letter dated 30th July 2010 which evidenced that he was in employment for the period from 4th June 2007 to 4th April 2008 but he had provided no further evidence. The respondent also challenged the fact that the appellant produced no evidence of how the EEA former spouse was exercising her treaty rights at the date of the divorce.

4. The matter came before First-tier Tribunal Judge Geraint Jones QC, who dismissed the appeal and who in the course of his preparation criticised the lax preparation of the case.

5. The appellant's representatives filed a permission to appeal application which confirmed that the only question on appeal was whether the appellant qualified as a worker. It was pointed out he had suffered serious mental health issues that had led to homelessness and a period of time in hospital. His mental health issues coupled with homelessness should be seen as difficult circumstances. It was asserted that the judge dismissed the appeal and made erroneous findings and drew conclusions that were simply unrealistic and unacceptable and showed little understanding of the appellant's serious mental health issues.

6. Specific criticism was made that the judge referred to the appellant having been convicted in 2009 when this was not the case and that the judge referred to a spouse visa being granted 'possibly erroneously'. This affected the judge's approach.

7. Further criticism of the judge was made at paragraph 20 of his determination where he stated that he could not understand when the appellant referred to "*I was working with ASAP",* quite what was meant by "*during this time*". Miss Fisher points out that there was a letter from ASAP showing that the appellant was working between 4th June 2007 and 4th April 2008 and that there was nothing opaque about that.

8. Miss Fisher also challenged further references within the determination to the appellant's itinerant lifestyle and the lack of notes attached to the consultant psychiatrist's report. These were medical notes and the psychiatrist had sight of them but it was not the job of the psychiatrist to set out each and every single day that the appellant was fit for work. Further the judge's findings that the appellant had no intention of finding work were not borne out by the witness evidence of Mrs O'Connell.

9. At the hearing before me Miss Fisher agreed that the question was whether the appellant had retained rights as at the date of his divorce. She contended that in fact he could be construed as a qualified person as at that date which was 16th May 2007. He had a period in hospital between 18th December 2006 and 23rd January 2007 but he was able to work outside that period. Indeed he was on the books of ASAP for one year. The fact that he was ill did not mean that he ceased being a worker further to Regulation 6(2)(a). Further to **FMB (EEA Regulations - reg 6(2)(a) – 'temporarily unable to work') Uganda [2010] UKUT 447 (IAC)** it did not matter how minimum the wage was, even a part-time worker could be protected. and if any illness was temporary if it was not permanent. Alternatively, the appellant could make use of Regulation 5(3). The broad position was that the EEA Regulations should not be interpreted restrictively. The appellant at the relevant time had been registered with an agency. The judge had failed to consider the records post-2008 which indicated that he was a worker.

10. Mr Melvin submitted that the appeal was to be considered in the light of the fact that it was up to the appellant to show that he was within the EEA Regulations. It was difficult to see from the evidence produced that the appellant could bring himself within the Regulations. The HMRC records had not been produced beyond 2008. The question was whether at all material times he was a worker and he had not shown this. The rest of the grounds were not relevant.

Conclusions

11. It is clear from Regulation 10(6) that the appellant must show that at the date of termination of his divorce that he "*would if he were an EEA national be a worker, a self-employed person or a self-sufficient person under Regulation 6*". The judge found at paragraphs 24 and 26 that the appellant was not engaged in employment or in the labour market since mid-May 2005. He stated that there was

> "*quite literally, no evidence of him ever seeking work and so properly being characterised as a jobseeker. I do not accept the appellant's evidence that he worked for no remuneration for the organisation described merely as 'ASAP'. I am prepared to accept that he may have done three weeks' work in about May 2005 but I find as a fact that he has done no remunerated work since that time; nor has he had any intention of doing so.*"

12. The fact is, however, that the letter from ASAP dated 30th July 2010 confirmed that the appellant was employed as a road sweeper for the London Borough of Hounslow as at 4th June 2007 to 4th April 2008 and the judge referred to this letter but stated that he did not accept that the appellant would work for no remuneration. The appellant also states in his witness statement that he was working in the early part of 2007 for the Big Bus Company and then worked as a bus surveyor and thereafter for ASAP recruitment agency from June 2007. There were no tax records to support this contention and the deficiencies in the evidence were addressed by the judge but I accept that the judge should have taken into account the letter from ASAP. This letter and the working period, *post dated* the date of divorce in May 2007.

13. The judge was critical of the presentation of the evidence but nonetheless I find that the failure to include or attribute weight to the ASAP letter in his assessment of the appellant's case was an omission which constitutes an error of low. It was unfortunate that the judge made reference to a conviction and some irrelevant comments but the key question was the nature of the evidence to support the appellant's contention that he was a worker and the judge found this to be deficient following the divorce.

14. I find and error of law and set aside the decision save that I preserve the findings in respect of the marriage and the appellant's ex-wife exercising treaty rights. In essence the judge accepted that the marriage had lasted for three years and the appellant and his ex-wife had lived together for one year thereby satisfying Regulation 10(5).

15. The further question was whether the appellant could be construed as a qualifying EEA national further to Regulation 10(6) following his divorce. The evidence of the appellant in his witness statement indicated that he was working prior to his divorce and the ASAP letter confirmed that he was working as a road sweeper for the London Borough of Hounslow. I do not accept that he would be doing this through an agency for nothing. There were no tax records produced but in view of the appellant's mental health this was perhaps understandable and indeed there were not records produced to show that he did *not* earn during this period.

16. The appellant had been diagnosed with schizophrenia and had a hospital admission between 18th December 2006 and 23rd January 2007 but despite this was able to work. I accept that intervening periods during this time of being unable to work could be protected under Regulation 6(2) whereby,

> *'a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if (a) he is temporarily unable to work as the result of an illness or accident'*

Thus following **FMB** where a person's inability or incapacity was not permanent it should be regarded as temporary. It does not appear that there is a time limit. In **FMB** the Tribunal held that

> *'A finding of temporary inability to work for an extended period would not be sustainable if a person having given up work owing to illness then abstained from working voluntarily. The evidence in this appeal however shows the claimant's father to have been unable to work until such time as developments in medication together with new combinations of medication stabilised and relieved his condition sufficiently to enable him to commence his studies'*

17. The reason for the appellant's erratic working since 2007 was his psychiatric difficulties in the form of paranoid schizophrenia. The evidence recorded was that he would find it difficult to work under pressure. I do not find that he abstained from work voluntarily. Indeed he was clearly willing and did work after his hospital spell from 2006 to 2007.

18. I accept that the medical evidence including that of the Community Mental health nurse and the report of Dr Klemperer indicates that the spell off work, particularly to 2010 was 'temporary'. It appears that the appellant's last stay in hospital came to an end on 4th June 2010. The appellant gave evidence in his witness statement that he worked in the community but did not give evidence in his statement that he had been seeking work or had worked post 2010. I accept that there was evidence that the appellant worked to 4th April 2008 and was hospitalised at Gordon Hospital from 3rd November 2009 to 4th June 2010. It was submitted that there were tax records showing he earned £1,883.08 from 2009/10 and £3,572.68 in 2010/2011. In fact the employer reference is 267/ESA500 indicating that this was a government reference and in fact income from Employment and Support Allowances. Indeed the appellant's witness statement indicates that he did not work after 2008. Even if I am incorrect about this I find that his period of inactivity between 2008 and 2010 can be explained through his illness and was temporary and involuntary and therefore his status as a worker is protected under Regulation 6(2).

19. The appellant entered the United Kingdom with his spouse on 10th January 2004. There was evidence from Harte Hanks that the appellant's ex wife was employed by that firm as an Account Manager from 27th September 2004. I conclude that the appellant's ex wife was exercising treaty rights from her period of entry into the UK and thus by extension the appellant has too been living in accordance with the EEA regulations since entry into the UK. I also conclude from the appellant's own employment records produced that he can demonstrate (from the ASAP letter) that at the time of his divorce he could be construed as a worker under regulation 6(2). From April 2008 until and discharge in June 2010 I accept that he was temporarily unable to work. I find that his admission in November 2009 indicates his ill health in the previous year. From the state of his health I do not accept that the appellant voluntarily elected not to work. However by January 2010 he would have, with his retained rights of residence achieved five years residence in the UK in accordance with the EEA Regulations (**Amos** [2011] EWCA Civ 552) and is entitled to a permanent right of residence.

20. At the date of his divorce Regulation 5(3) would not have assisted him but following his last spell in hospital (as it appears he did not work after 2010), I find that he could be assisted by Regulation 5(3) as this period, which commenced in 2010, post dated his divorce and he could be categorised as a worker who has ceased activity. Under 5 (3)

> *A person satisfies the conditions in this paragraph if –*
> *(a) he terminates his activity in the United Kingdom as a worker or self-employed person*
> *as a result of a permanent incapacity to work; and*
> *(b) either –*
> *(i) he resided in the United Kingdom continuously for more than two years prior to the termination;*

21. I therefore allow the appellant's appeal under the EEA Regulations.

22. I also turn to a consideration of the human rights aspect. I find that the appellant can claim residence under the EEA Regulations and therefore the Immigration Rules are not applicable. Nonetheless I find that he has established a family life and private life in the UK. He retains contact with his son and has regular mental health treatment for his schizophrenia. He has been in the UK now for 10 years. The threshold for engaging Article 8 is low. I find that the decision to remove the appellant is not in accordance with the law. The question of proportionality does not therefore arise.

Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

I allow the appeal under the EEA Regulations and on human rights grounds.

Signed Date 6th December 2014

Deputy Upper Tribunal Judge Rimington