



**First-tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/30158/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 July 2015**

**Decision & Reasons Promulgated  
On 11 August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**NEDU MARK NWA-AMADI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr W Akaho, Solicitor, BWF Solicitors

For the Respondent: Mr K Norton, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is my ex tempore decision at the hearing today. The Appellant appeals with permission against the determination of First-tier Tribunal Judge J S Pacey. She had dismissed the Appellant's appeal which was considered on the papers at the Appellant's request. The Appellant is a citizen of Nigeria. On 14 May 2014 he had applied for a residence card as confirmation of a right to reside in the United Kingdom. He had said that he was divorced from an EEA national. That EEA national is called Miss Veronique Mathern. The marriage was said to have taken place on 10 January 2009 and the divorce on 28 August 2012.

2. The First-tier Tribunal Judge's determination had stated in part as follows: Firstly, that the Appellant had not discharged the burden of proof on him in relation to Regulation 10(5) and in relation to Regulation 10(5)(d) of the Immigration (EEA) Regulations 2006. Secondly, that the appeal was to be dismissed. Thirdly, that all of the evidence that had been submitted had been taken into account including P60s tax documents in the Appellant's name.
3. In relation to the documents before me, the Appellant has sought to rely upon a bundle of documents with an index page marked A1 to F4. In addition the Respondent provided during the hearing a copy of a determination of First-tier Tribunal Judge Ghaffar which was promulgated on 20 March 2014. I shall return to that determination, but it is to be noted that the decision had related to a previous application which had been made by the Appellant under the EEA Regulations, but which had also been dismissed.
4. It is relevant to set out the Regulations themselves and it is Regulation 10(5) and 10(6) in particular which are relied upon.
5. In these Regulations a family member who has retained the right of residence means subject to paragraph 8 a person who satisfies the conditions in paragraph 2, 3, 4 or 5

“(5) A person satisfies the conditions in this paragraph if—

- (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
- (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
- (c) he satisfies the condition in paragraph (6); and
- (d) either—
  - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;
  - (ii) the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has custody of a child of the qualified person;
  - (iii) the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has a right of access to a child .... “

(6) 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; or
  - (b) is the family member of a person who falls within paragraph (a).
6. In relation to the grounds of appeal, the ground of appeal which was stressed was that there was a material error of law because the judge had failed to consider the contention that there was no necessity to show that the couple had to be living together and there was reference to the European Court's decision in **Aissatou Diatta v Land Berlin**. It is said a marital relationship is not affected merely because the spouses have lived separately.
7. The summary of the case at paragraph 2 of the report states:

"For the purposes of Article 10 of Regulation number 1612/68 which provides for the right of a migrant worker's spouse to install herself with him the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouse has lived separately even where they intend to divorce at a later date."

This then also takes into account the Court of Appeal's decision of **Amos v Secretary of State [2011] EWCA Civ 552**.

8. Mr Norton conceded that there is a material error of law in the decision because the First-tier Tribunal Judge did expect the couple to be living together, but that was not necessary. In the circumstances Mr Akaho on behalf of the Appellant invited me to remake the decision and as I have indicated, a large bundle of documents was provided, many items of which includes documents that were not before the First-tier Tribunal Judge.
9. As I indicated during the submissions of the parties there is a difficulty which arises and that difficulty stems from the fact that Judge Ghaffar made adverse credibility findings in his determination. That determination was not available to Judge Pacey. Judge Ghaffar had said in part at paragraph 12 of his determination as follows:

"There were payslips provided how the enquiry with the HMRC damages the credibility of these documents. The Appellant has not provided any evidence from the employers to verify the employment. He has not sought to provide any explanation with regards to the records held by the HMRC. Accordingly I find the Appellant has failed to provide satisfactory evidence that his former wife, an EEA national, was exercising her treaty rights in the United Kingdom for the purpose of the EEA Regulations."
10. Mr Norton says that there is still a lack of evidence to show that the EEA national was exercising treaty rights in the UK for the purpose of the EEA Regulations with reference to Regulation 13. He says while one needs to look at page C1 of the bundle now before me, document C1 states in part as follows in relation to checks which were made by UKBA with Her Majesty's Revenue and Customs: "No employments have been traced for

the period requested according to HMRC systems and for self-assessment no trace on HMRC systems.”

11. Therefore on the one hand I have the HMRC document and Judge Ghaffar’s findings (which incidentally were not the subject of any appeal and therefore at the very least those findings are the starting point for the decision which has to be considered). But on the other hand I have now the documents at C6 and at C7. C6 is for the years 2012 to 2013 and it is said therefore this is indicative of showing that treaty rights must have been exercised because the Appellant's former wife was working according to this tax calculation.
12. However, the difficulty which arises, as I indicated to Mr Akaho during his submissions, is that there is no actual explanation as to how it is that there continued to be documents sent from for example, the HMRC, to the Appellant's former wife at her previous address and how it is that these documents have been obtained at all. This cannot be explained by way of submissions and as I have discussed with Mr Akaho that what he says cannot be evidence. Indeed as eloquent and as helpful as he has been, I cannot accept his submission as equating to evidence, as much as I would want to do so. This is an important part of the case.
13. The difficulty is in reality of the Appellant's making. The Appellant had chosen to have his case considered on the papers before the First-tier Tribunal Judge and similarly the Appellant has chosen to have his case considered without any evidence from him. There was no witness statement from him for this hearing, despite the large bundle and he has not therefore been heard in respect of any oral evidence.
14. There remains a difference in the documentation which I am unable to resolve. I make it clear that I am not making any findings that there has been deception or fraud on the part of the Appellant. To do that would be to go too far. What I conclude however is that the burden of proof has remained on the Appellant throughout and he in the circumstances has failed to discharge that burden of proof. It on that basis that although I find a material error of law in Judge Pacey’s decision, when remaking the decision, I have no alternative and indeed no hesitation in concluding that the Appellant's appeal based on seeking a residence card has to be dismissed.
15. In the circumstances the appeal is dismissed. Of course it is a matter for the Appellant as to what he does next. As explored with Mr Akaho during submissions, it appears open to the Appellant should he so choose, without any indication one way or the other from me, to make a further application to the Secretary of State based on the EEA Regulations. For present purposes, I say no more than that the appeal fails and is dismissed.

### **Notice of Decision**

The original appeal involved the making of a material error of law. I remake the decision and dismiss the appeal.

There is no anonymity direction

Signed

Date

Deputy Upper Tribunal Judge Mahmood