



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: IA/37521/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 September 2015**

**Decision & Reasons Promulgated  
On 9 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**MR JAMES KIYEMBA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Garrod of counsel

For the Respondent: Mr C Avery, a Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. In this appeal, the appellant appeals against a decision of the First-tier Tribunal dismissing his appeal against a decision taken on 29 August 2014 to refuse to issue a permanent residence card as a family member of a European Economic Area ('EEA') national.

**Background Facts**

2. The appellant is a citizen of Uganda who was born on 12 November 1972. He applied for a permanent residence card as a family member of an EEA national (Katarzyna Kowalczyk Kiyemba – a Polish National) in accordance with Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006 ('the EEA Regulations'). That application was refused on the basis that the Secretary of State was not satisfied on the evidence provided that the appellant had demonstrated that the Sponsor had been and continued to be economically active in the UK for a continuous period of five years.

### **The Appeal**

3. The appellant appealed to the First-tier Tribunal. The appellant had asked for the appeal to be decided on the papers without a hearing. Judge Robson dismissed the appellant's appeal in a decision dated 20 February 2015. The First-tier Tribunal found that there was evidence of four years continuous employment from 6 April 2010. The judge found that there was no evidence of a fifth year of employment.

### **The Appeal to the Upper Tribunal**

4. The appellant sought permission to appeal to the Upper Tribunal. On 5 May 2015 First-tier Tribunal Judge Levin granted permission to appeal. Thus, the appeal came before me.

### **Summary of the Submissions**

5. The grounds of appeal assert that the judge imposed too narrow a construction of how the appellant's wife ('the sponsor') could meet the criteria under Regulation 6 of the EEA Regulations. It was submitted by Mr Garrod that the relevant period can also cover 2014 – 2015 not just up to 2014. The EEA Regulations require simply a period of 5 years at any time up to the date of the hearing. The judge materially erred in law in paragraph 20 by finding that he had to consider whether a fifth year of employment has been demonstrated. The judge imposed too high a standard of proof. Regulation 6 of the EEA Regulations covers more than being a worker. It includes self-employment and work seekers. The judge accepted that the sponsor was in self-employment in 2008, at paragraph 8, and accepts the evidence that she was working between April 2010 – 2014. On the balance of probabilities if she had proved four years of working and there was evidence that she had been in the UK then there was no reason why the judge could not have found that the sponsor was working during the remaining periods. There is no need for absolute proof. There is a requirement to take extraneous evidence into account. There is scope within the Regulations for interpretation and in this case the appellant doesn't have to provide proof there are other factors that can be taken into consideration. The judge should have considered whether it was probable that the sponsor, in the circumstances, had been in the UK under one of the Regulation 6 heads for 5 years. The sponsor must have been in the UK exercising treaty rights prior to 2010 as the appellant was granted

leave on 1 January 2009. Mr Garrod submitted that there was nothing to show that she had not been exercising treaty rights since 2008.

6. Mr Garrod also submitted that under Regulation 3 it is clear that the sponsor is permitted to be outside of the UK for a period of 6 months. It follows from this, in his submission, that she has been exercising her treaty rights before 2010. It was not submitted that the sponsor had in fact been outside of the UK but the effect of Regulation 3 is that in either of the years at the beginning or end of the 4 year period she would be deemed to be exercising treaty rights for a period of six months.
7. Mr Garrod submitted that the appellant's case was supported by Paragraphs 4 and 5 of the headnote in the case of Idezuna (EEA – permanent residence) Nigeria [2011]UKUT 00474 (IAC). This was a surprisingly similar case in terms of the arguments raised. The approach in Idezuna should have been followed and if it had the decision would have read significantly differently.
8. Mr Avery submitted that the grounds were merely a disagreement with the findings of the judge. The judge was confined to the documents in front of him. The lack of evidence was flagged up in the reasons for refusal letter. The appellant asked for the appeal to be heard on the papers. If the sponsor has been exercising treaty rights in the UK there should be no reason why that cannot be demonstrated. It is speculation as to whether the sponsor was exercising treaty rights in the absence of evidence.
9. With regard to the Regulation 3 issue Mr Avery submitted that this was not relevant as it was not being argued that the sponsor was outside the UK. The problem is that we do not know what the sponsor has been doing.

## **Discussion**

10. Regulation 6 of the EEA Regulations provides that a qualified person is:
  6. (1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—
    - (a) a jobseeker;
    - (b) a worker;
    - (c) a self-employed person;
    - (d) a self-sufficient person; or
    - (e) a student.
11. I accept Mr Garrod's submission that employment is only one of a number of ways that an EEA national can be considered to be exercising treaty rights. The First-tier Tribunal judge was therefore incorrect to find that he had to consider whether or not a fifth year of employment had been demonstrated (paragraph 20). That is an error of law, however it is not a material error for the reasons set out below.

12. What the appellant was required to demonstrate was that his wife had exercised treaty rights for a continuous period of five years in the UK, had resided here for a continuous period of five years and that the appellant had lived with his wife in the UK throughout that period. Regulation 15, insofar as is relevant, provides:

Permanent right of residence

**15.** (1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

13. The 5 year continuous period need not be immediately prior to the application for a permanent residence card and the period can be considered up to the date of the hearing of the appeal.

14. In this case there is no evidence of a five year continuous period where it can be demonstrated that the appellant's wife was a qualified person. The evidence is:

- September 2008 HMRC confirmed that the sponsor was self-employed in the UK from February 2008
- Bank statements showing payments from Riverwoods on 27/6/08, 29/8/08 and 22/12/08
- One Bank statement for the period January 2009 - February 2009 which demonstrate that the sponsor was in the UK during that period but no evidence of receiving any income from employment or self-employment

15. There is then a gap until 2010. The First-tier Tribunal accepted evidence covering the period April 2010 - April 2014 primarily from self-completed tax returns. I do not go behind that finding except to record in passing that in the absence of other corroborating evidence I would not have accepted such self-completed returns as evidence of working either as employed or self-employed.

16. There is evidence post April 2014 in the form of a bank statement covering the period May - June 2014. I am not entirely clear what the payments into the bank account during this period represent - there are 'bill payments' from M Wronski and Z Stezalska. However, the lack of clarity concerning these payments is immaterial as that is the only evidence post the accepted four year period. I asked Mr Garrod if he could point me to any evidence of employment/self-employment in the period April 2014 -

February 2015 (the date of the hearing). He could not take me to any such evidence.

17. The appellant cannot demonstrate from the evidence a five year continuous period of employment or self-employment as the evidence at its highest demonstrates employment/self-employment from February 2008 - December 2008 with a gap then of 16 months to April 2010. Even if the bank statement of January 2009 - February 2009 were taken into account together with the issue of a residence card to the appellant in January 2009 as evidence of exercise of treaty rights by the sponsor, there remains a gap of 14 months from February 2009 - April 2010.
18. It was not submitted that the sponsor had been a work seeker, was self-sufficient or was a student during these periods. In the appellant's EEA4 Permanent Residence card application he ticked the box self-employment recording 3/2/08 - to present in the section on details of the exercise of treaty rights that he relied on. In that section there are other options, namely, seeking work, economic self-sufficiency, study, permanent incapacity, temporarily incapacitated and unemployed and undertaking training. None of these boxes were ticked.
19. Mr Garrod submitted that strict proof was not necessary and that extraneous factors could be taken into account. It is for the appellant to demonstrate that he meets the requirements of the Regulations. That will require evidence of some description to be produced and whilst the judge can take any relevant factors into consideration this was a case that the appellant requested be considered on the papers. The Secretary of State had already indicated that there was insufficient evidence in the reasons for refusal letter.
20. Mr Garrod also submitted, in effect, that only four years needs to be demonstrated as a six month period either side of a four year period deems the sponsor to have been exercising treaty rights in accordance with Regulation 3 of the EEA Regulations. I reject that submission. There was no evidence that the sponsor had in fact been outside the UK during the relevant period. Regulation 3 is not a deeming provision in the manner suggested by Mr Garrod. It merely enables an EEA national to continue to build up a continuous period of residence notwithstanding periods in which they are outside the UK for specified periods in any one year.
21. Although the First-tier Tribunal judge made an error of law by considering that he had to find a further year of employment this was not material. The judge would inevitably have arrived at the same conclusion, namely that the appellant has not demonstrated a five year continuous period where the sponsor was exercising treaty rights.
22. Mr Garrod relied on the case of Idezuna. This case does not assist the appellant. In Idezuna the appellant had established that his wife had exercised treaty rights for a five year continuous period. The error in relation to this issue was that the First-tier Tribunal had been wrong to

focus exclusively on the appellant's circumstances in the five years immediately preceding his divorce.

23. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

**Decision**

24. There was no error of law such that the decision of the First-tier Tribunal is set aside.

Signed P M Ramshaw

Date 9 October 2015

Deputy Upper Tribunal Judge Ramshaw