Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46139/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 3rd November 2015	**On 12th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR ROLAND OKUNHON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Osung - Solicitor
For the Respondent: Mr J Harrison – Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Roland Okunhon, a citizen of Nigeria born 6th October 1984. He appeals against the determination of First-tier Tribunal Judge Grimes issued on 21st May 2015 dismissing his appeal against the decision of the Respondent made on 4th November 2014 to grant a Residence Card on the basis of his claimed retained right of residence in the UK.

2. On 26th August 2015 Designated Judge Zucker granted permission to appeal. He said:

> "The grounds submit that the Judge imposed too high a burden of proof. Given the guidance in **HS (EEA: revocation of retained rights) Syria [2011] UKUT 00165** para 59, the grounds are arguable."

3. The Appellant had entered the UK in August 2006 as a working holidaymaker. He married a Portuguese national on 18th July 2008 and on 30th July 2010 was issued with a Residence Card as the family member of an EEA national, valid until 24th August 2014. He and his wife then divorced. The Decree Absolute is dated 17th June 2014.

4. Judge Grimes determined this case on the papers as requested by the Appellant. According to the written submissions the Appellant's wife had been employed on a part-time basis and was also self-employed as a domestic worker throughout the marriage. Judge Grimes dismissed the appeal because she was not satisfied that the Appellant had established to the standard of proof required that his ex-wife had been exercising Treaty Rights in the UK. She noted in the determination the documents that she had before her. There were payslips from 2009; a tax return calculation from HMRC for 2012/13 reflecting an income from self-employment for that tax year; a letter from HMRC dated 31st January 2014; payment requests for HMRC national insurance class 2 contributions for the periods October 2013 to April 2014 and 6th April to 11th October 2014.

5. Judge Grimes noted that there was no evidence of any working activity in 2008 and evidence only of employment for two months in 2009. There was no evidence of activity in 2010 or 2011 and the partial tax return for 2012/13 did not show that the Appellant's ex-wife was employed throughout that period. The letter from HMRC dated 31st January 2014 indicates that the Appellant's wife had had no tax liability since 2012/13 and the national insurance demands do not establish continuous employment or self-employment as they are standard demands for small amounts and are not based on evidence of self-employment. Judge Grimes said that the Appellant had to show that his wife was exercising Treaty Rights as at the date of the termination of the marriage i.e. 17th June 2014 and had failed to do that.

6. I am not entirely sure why Designated Judge Zucker said that the wrong standard of proof had been applied and this was not clear to the representatives before me either. What is submitted in the Grounds of Appeal is that it is unreasonable to expect an Appellant to provide a complete set of documents relative to his ex-spouse's employment spanning the entire period of their marriage and the Judge erred in discounting evidence that was properly before her. She ought to have taken into account the documents which in totality are sufficient to show that the Sponsor was exercising Treaty Rights. It is submitted that registration with HMRC and payment of NI contributions are the requested and accepted proof of self-employment by the Respondent and once these have been provided the burden shifts to the Respondent if he wishes to challenge their validity. It is stated that the Judge was erroneously placing upon the Appellant the burden of proving "actuality of self-employment" and this is an error of law.

7. In oral submissions Ms Osung said that she was relying essentially on the demands for national insurance contributions since it is these that cover the relevant period. I explained to her that following **HS** I had taken into account, as had Judge Grimes, the earlier documents and the fact that

presumably when the Residence Card was granted in the first place the Respondent was satisfied that the Sponsor was exercising Treaty Rights at that time. This did not mean however that she was necessarily exercising Treaty Rights at the time of the second application and decision.

8. Mr Harrison pointed out indeed that the demand for national insurance contributions dated 4th October 2014 was sent to the Sponsor at the address at which she had been living with the Appellant. She had been for some time away from that address. I had earlier confirmed with the Appellant that she had left him in the home in which they shared and he continues to live there. Mr Harrison reasonably pointed out that this would indicate that the Sponsor had not told HMRC about her change of address which gave some support to his submission that she was not working at all.

9. I have given careful consideration to the terms of the determination of Judge Grimes and to the submissions made. The burden is of course on the Appellant to provide sufficient evidence to show that his wife was exercising Treaty Rights at the relevant date. I do acknowledge that there are difficulties when a couple has divorced. The Appellant said that his wife had refused to give him any documents and the ones that he had submitted he had found in the house. It seems to me however that the evidence before the Judge did not establish that the Sponsor was at the date of the termination of the marriage exercising Treaty Rights in the UK and indeed the information that she did have, such as the fact that HMRC apparently did not have the Sponsor's current address, to some extent indicated that she was not working. There was no basis on which the Respondent was required to challenge the validity of the documents. The issue was the extent to which the documents provided the required information. The demands for National Insurance confirm only that the Appellant's ex-wife was registered with HMRC for the payment of National Insurance contributions and on their own do not even raise a presumption sufficient to require rebuttal by the Respondent. Judge Grimes gave reasons at paragraph 10 for her decision. She was entitled to reach the conclusions she did on the evidence before her. It is also the case of course that the Appellant chose not to appear before the Tribunal so she was unable to take any oral evidence from him.

10. There was a rather belated submission made that the Respondent was under a duty to try to get the necessary evidence from HMRC. I understand that the Home Office have a policy, for reasons of privacy and data protection, to do this only very rarely if certain conditions are satisfied but in any event there was no basis in this case for such an enquiry as no request or application had been made to the Respondent or indeed to the Tribunal for the release of evidence or information relating to the Sponsor.

Notice of Decision

In all the circumstances I find that there is no material error of law in the determination of the First-tier Tribunal and that decision shall stand.

No anonymity direction made.

Signed
Deputy Upper Tribunal Judge N A Baird 10 November 2015