



**The Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal number: IA/48104/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 October 2015**

**Decision & Reasons Promulgated
On 3 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR RICHARD OLAREWAJU OWOLABI
(NO ANONYMITY DIRECTION)**

Respondent

Representation:

Appellant

Mr Nath (Home Office Presenting Officer)

Respondent

Mr Khan, Counsel, instructed by Legacy Law

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a national of Nigeria and he applied for the permanent residence card as confirmation of a right to reside in the United Kingdom on September 3, 2014. The respondent refused his application on November 15, 2014 because she was not satisfied the appellant had

demonstrated that his former wife had exercised treaty rights up to and including the date of the decree absolute.

3. The appellant appealed this refusal under Regulation 26 of the Immigration (EEA) Regulations 2006.
4. The matter was heard by Judge of the First-tier Tribunal Symes on May 6, 2015 and in a decision promulgated on June 2, 2015 the Tribunal allowed his appeal under the 2006 Regulations.
5. The respondent applied for permission to appeal on June 9, 2015 submitting the Tribunal had erred by allowing the appeal in circumstances where the appellant had accepted he had been unable to provide evidence that his former wife had been trading between June 2012 and August 2013.
6. Permission to appeal was granted by Judge of the First-tier Tribunal Ford on August 25, 2015 on the basis that it was arguable the Tribunal had erred for the reasons set out in the grounds of permission save paragraph [8] of the grounds was rejected.
7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

8. Mr Nath relied on the grounds of appeal and in particular submitted that there was no documentary evidence to demonstrate that the EEA national wife had been exercising treaty rights during the period July 2012 and August 2013. The letters from HMRC dated July 15, 2013 and August 5, 2013 did not address the gap between July 2012 and July 2013 and at the very best all it could be said was that she had demonstrated an intention to run a business from July/August 2013 but this did not satisfy the EEA Regulations that required the appellant to demonstrate that she had been exercising treaty rights. Oral evidence given to the Tribunal was insufficient to demonstrate this and there was an error in law.
9. Mr Khan submitted there was no error of law and invited me to take into account the fact that this was a domestic violence case and obtaining evidence from the appellant's former wife would be difficult. The Tribunal had heard oral evidence from the appellant and found him to be a credible witness and the Tribunal also had the aforementioned letters from HMRC and he submitted that HMRC would not have issued the EEA national with a UTR reference if it was not satisfied she was genuinely self-employed. He invited me to find there was no error in law.

DISCUSSION AND FINDINGS

10. Permission to appeal had been granted to the respondent on the basis it was arguable that the Tribunal had erred in concluding in paragraphs [22] and [23] that the EEA national was established in business.
11. The appellant had accepted in both his written and oral evidence that he could not provide evidence demonstrating that she had been actively working during the period July 2012 and August 2013. The Tribunal heard oral evidence from him and that evidence was recorded in paragraph [21] of the Tribunal's decision. In short, the tribunal took into account the appellant's oral evidence and the two letters from July and August 2013.
12. The argument put forward today by Mr Nath is that this evidence was insufficient for the Tribunal to make a finding that the appellant's wife had been a qualified person for the purposes of the Regulations.
13. Whilst I note Mr Khan's submissions I am satisfied that there is a material error in law. The Regulations do not distinguish between parties who are together and parties who are separated. Many cases come before these Tribunals where parties are separated but the burden is on the appellant to satisfy the Tribunal that the EEA national was at all times a qualified person.
14. In this particular appeal whilst I take on board Mr Khan's submission relating to the two letters dated July and August 2013 I am satisfied that that his submission does not address the previous twelve-month period (July 2012 to July 2013) where there was an absence of any evidence of employment.
15. Those HMRC letters may indicate that in July/August 2013 the appellant's ex-wife decided to start her own business and if those letters had been dated July 2012 then Mr Khan's argument may have had more weight. However, the Tribunal erred because it had no evidence to cover the missing twelve-month period and the oral evidence was insufficient because the appellant was not in a position to provide evidence that she was working or running her own business.
16. In the circumstances the Tribunal was wrong to find the EEA national was a qualifying person up to and including the date of the decree absolute.
17. I indicated to both representatives at the hearing that if there was a material error then this appeal had to fail. Accordingly, I set aside the Tribunal's earlier decision allowing this appeal under the 2006 Regulations.

DECISION

18. There was a material error. I set aside the original decision and remake the decision and dismiss the appeal under the 2006 Regulations.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no fee award as the appeal has been dismissed.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis