Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03751/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st June 2017	**On 25th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

CHIJIOKE PHILIP OKPALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Tampari, Chancery CS Solicitors, London
For the Respondent: Mr Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 5th July 1983. He appealed against the decision of the Respondent dated 21st January 2016 refusing his application for a residence card as confirmation of a right to reside in the United Kingdom. He was granted a residence card as the spouse of [M] Wienhusen, an EEA national exercising treaty rights in the United Kingdom in 2010 and he is now seeking permanent residence on the basis of retained rights following his divorce from his EEA spouse. His appeal was heard by Judge of the First-tier Tribunal Fox on 19th July 2016. The appeal was dismissed and a decision promulgated on 26th July 2016.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Keane on 9th May 2017. The permission states that the judge made a material misdirection of law when

incorporating, as a requirement for permanent residence, that the appellant should have been party to an active relationship with his EEA national spouse, at the same address, for a period of at least a year prior to the divorce (paragraph 15). This is not required under Regulation 10, (5) and (6) of the Immigration (EEA) Regulations 2006. The permission goes on to state that the judge did not give any or any adequate reasons for failing to accord weight to many of the documents submitted by the Appellant, which are listed at paragraph 5 of the grounds. It states that when these are taken together they may have established that the Appellant and his EEA national spouse lived at the same address. The judge refers to the documentary evidence as "merely suggestive" (paragraph 7). The judge was also seeking corroboration but the decision does not make it clear what the nature and extent of the corroborative evidence that he required sight of was.

3. There is a Rule 24 response on file which states that it is not clear from the grounds whether the payslips from 2009, of the Appellant's ex-spouse, covered the entire period up until the divorce. The judge found there was insufficient documentation to suggest that she was exercising treaty rights for the requisite period and there was limited information to explain what the actual circumstances were and these matters would have been fatal to the appellant's claim even if the error at paragraph 15 had not been made.

The Hearing

4. Both parties accepted that the judge's finding at paragraph 15 of the decision is an error of law but the Respondent submitted that it may well not be a material error of law. The couple do not require to have been staying with each other for one year but they both require to have been in the United Kingdom for one year during the period of the marriage.

5. The Appellant's representative submitted that he is relying on the permission granted and I was referred to paragraphs 15 to 18 of the decision. The representative submitted that the judge does not engage with the documents before him, in particular relating to the economic activity of the appellant's ex-partner. I was referred to the Appellant's original bundle and the Appellant's representative submitted that there is sufficient evidence in the form of payslips and P60s to show that the Appellant's ex-spouse was exercising treaty rights up until the date of the divorce. He submitted that the judge did not take all the evidence before him into account when he made his decision. I was referred to the P60s showing an increase in the appellant's ex-spouse's income each year up to 2013.

6. He submitted that at paragraph 18 the judge again did not take into account all the documents before him relating to the Appellant's work after the date of the divorce.

7. With regard to the Appellant having been found not to be working for Pinnacle Sure Contracting Limited the representative submitted that the Appellant worked for agencies who subcontracted him out. He left Pinnacle and has provided payslips for his new employer up to 2016.

8. With regard to the spelling of the Sponsor's name which is stated to be Wienhusen, on her payslips and the divorce decree name her as Weehusen and he submitted that this was accepted by the Respondent when the original residence card was granted to the Appellant. He submitted that because of this the Appellant did not address this.

9. He submitted that the Appellant's ex-wife refused to produce her HMRC documents for this hearing because she is no longer in a relationship with the Appellant.

10. The Presenting Officer submitted that at paragraph 19 of the judge's decision the judge refers to the point about the Appellant's ex-spouse's name. He then goes on to refer to her employment, stating that he is not satisfied that she was a qualified person exercising treaty rights during the relevant period of marriage up to her divorce. He submitted that because of this finding the judge found the Appellant does not qualify for permanent residence in the United Kingdom and he was entitled to come to this conclusion. The Presenting Officer submitted that the judge has to look at everything required under the Regulations and it was open to the judge to comment on the misspelling of the Appellant's ex-wife's name. He submitted that although the Appellant states that there is sufficient evidence about his Sponsor, the judge has not gone into any detail about the 91 page Appellant's bundle submitted for the First-tier hearing. There were only three payslips for the Appellant's ex-wife from 30th June 2013 until 30th September 2013 so the P60s had to be relied on. The judge then referred to the Appellant's payslips which show that he was employed from 15th December 2015 onwards. There are also P60s for the Appellant. He submitted that the judge was entitled to his findings based on what was before him.

11. I was asked to find that there is no material error of law in the judge's decision.

12. There was a 91 page bundle submitted to the First-tier Tribunal for the appeal hearing. It contains employment details for the Appellant's ex-spouse and also for the Appellant. There are also bank statements reflecting salaries and wages for the Appellant. Additional evidence has also been provided about the Appellant and his wife cohabiting.

13. I have noted that this appeal was dealt with on the papers. As previously stated there is an error of law in the judge's decision in that he refers to the Appellant having to live with his spouse for one year prior to the divorce. This does not form part of the Regulations. I have to decide if this is a material error.

14. At paragraph 9 the judge states that he has considered all the documents attached to the appeal and it is clear that he is referring to the 91 page bundle as he refers to the Appellant's witness statement which is the first document in this bundle.

15. The judge states that he is not satisfied that the Appellant resided in the United Kingdom during the relevant period. At paragraph 17 he states that he doubts whether the marriage was genuine and subsisting. The judge also states that he is not satisfied that the Appellant has been exercising treaty rights since the date of the divorce.

16. The judge has not specified in any detail what documents he is satisfied with and what documents he is not satisfied with. He has merely made general comments relating to the Sponsor's periods of work and the Appellant's periods of work. There is considerable evidence in the 91 page bundle and it is not clear from the judge's decision exactly what he considered.

17. The judge refers to the spelling of the Sponsor's name at paragraph 19. He refers to it being strange that a residence permit was granted in spite of the discrepancy in her name. This is something that has to be considered. Although the name is similar it is not the same and it appears on his ex-wife's payslips and on the decree absolute. The marriage certificate should have been supplied so that this can be dealt with properly. The judge was entitled to refer to this.

18. I find that there are material errors of law in the judge's decision. Because of the lack of detail relating to the payslips, P60s and bank statements in the decision it is not clear what the judge has taken into account. There is also the error of law referred to about the parties having to stay with each other for one year before the date of divorce. This is not contained within the Regulations. I find that more should have been made of the misspelling of the sponsor's name on various documents. Further evidence is required about this to enable a clear decision to be made.

19. There are material errors of law in the decision of Judge Fox, promulgated on 19th July 2016.

20. This appeal must be set aside and remitted to the First-tier Tribunal for hearing, but not before First-tier Tribunal Judge Fox.

21. No anonymity direction is made.

Signed Date 21/07/2017

Deputy Upper Tribunal Judge I A M Murray