Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20088/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th July 2017	**On 18th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

HABEEB OLUSOLA SULAIMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Okoroh, Counsel
For the Respondent: Mr Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria (born 12th September 1972). He appealed against the decision of the Respondent dated 18th May 2015 refusing to grant him permanent residence in the United Kingdom under Regulation 15 of the EEA

Regulations 2006, as the ex-spouse of Ms Analucia Lopes, a Portuguese citizen. It is claimed that she was exercising treaty rights for at least five years up to the point that she and the Appellant divorced on 14th September 2014.

2. The appeal was heard by Judge of the First-tier Tribunal Bradshaw on 27th September 2016 and in a decision promulgated on 29th October 2016, the appeal was dismissed.

3. An application for permission to appeal was lodged and permission was granted by FtTJ Hollingworth on 17th March 2017. The permission states that it is arguable that the judge has not set out a full enough analysis for why she did not accept that the evidence submitted by the Appellant was sufficient to show that Ms Lopes had been in continuous employment for the requisite five year period up to the date of divorce. This was with particular reference to the set of P60s which had been submitted.

4. A Rule 24 response was served by the Respondent which in terms, submitted that the judge had directed herself appropriately and given explanations, and thus reasons why she had disagreed with the Appellant's case.

5. It is convenient at this point to set out the background to this appeal. The Appellant entered the UK on an unknown date. On 18th December 2009 he married Analucia Lopes, a Portuguese citizen present in the UK. On 16th November 2010 he was issued with a residence card as a family member of an EEA national exercising treaty rights.

6. On 15th September 2014 the Appellant and Ms Lopes were divorced. The Appellant applied on 31st December 2014 for a permanent residence card on the basis that Ms Lopes was continuously exercising treaty rights as a worker from 5th April 2009 to 15th September 2014.

7. In support of the application there was produced the following documents relating to Ms Lopes' employment:

    P60 for 2009/2010

    P60 for 2010/2011

    P60 for 2011/2012

    P60 for 2012/2013

    P60 for 2013/2014

    In all, these 5 P60s cover the period 6th April 2009 to 5th April 2014. In addition, there was a set of pay slips for employment at Alvonso Davis Enterprises Limited for five consecutive months from May 2014 to September 2014. There was no payslip for April 2014 showing employment and no explanation for this absence.

8. The Respondent refused the application initially because she was not satisfied that the P60s were the product of genuine trading companies. Secondly, it was noted that

the wage slips produced showed wages paid in cash which made it difficult to confirm the employment, there being no evidence of wages being paid or banked.

9. When the appeal came before the First-tier Tribunal, the judge narrowed the issue when she said the following:

> "It was agreed that the only issue for me to determine was whether the Appellant could rely on his ex-wife's having exercised treaty rights for a continuous period of five years to the date of divorce".[5]

The UT Error of Law Hearing

10. Before me Mr Okoroh attended on behalf of the Appellant and Mr Avery for the Respondent. Mr Okoroh's submissions relied in the main on the lines of the grounds seeking permission. The main thrust of his submissions centred on the P60s relating to Ms Lopes' claimed employment.

11. He submitted that the evidence of the P60s alone were sufficient to show continuity of employment for the requisite period. Although they are a bare statement of Ms Lopes' employment, nevertheless they amount to sufficient evidence. Likewise, when coupled with the evidence of Ms Lopes' pay slips there was sufficient evidence up to the point of divorce to show that Ms Lopes was working and therefore exercising treaty rights. The decision of the First-tier Tribunal should be set aside for error as the judge had not properly explained why she rejected the sufficiency of that evidence. The appeal should be allowed.

12. Mr Avery defended the decision. He submitted that the P60s alone did not, in this case, go anywhere near to showing that Ms Lopes was continuously exercising treaty rights as a worker for the requisite period. He submitted that the judge had accepted that it may be difficult for an ex-spouse to obtain evidence but there was a question mark over the minimal amount of earnings showed on the P60s. There was an absence of evidence in this case detailing Ms Lopes' employment history sufficient to show that she had been exercising treaty rights over the five year period. He submitted that the figures simply did not add up and that the judge was correct in her analysis at [23] and [24]. The decision was sustainable and should therefore stand.

Consideration

13. Both representatives were in agreement that the FtT Judge had correctly identified at [5] the only issue before her was whether the Appellant could rely on his ex-wife having exercised treaty rights for five years up to the point of divorce.

14. Mr Okoroh's challenge to the judge's decision centred on a criticism of her analysis in [23] when she said that a P60 does not of necessity give a full picture of work for the tax year in question. It gives the total earned in the tax year and does not account for gaps in employment or time off work generally. Mr Okoroh's criticism ran on to say

that the judge had speculated and had failed to say why the evidence of the P60s and pay slips was insufficient to satisfy the Regulation.

15. I find that the FtTJ was correct in her analysis at [23] to [24] in concluding that the P60s were insufficient to enable the Appellant to discharge the evidential burden upon him. I say this for the following reasons.

16. The Appellant's case is that his ex-wife worked continuously throughout the relevant period. If one looks at the oral evidence of the Appellant, he is noted as saying in his evidence before the FtT at [14] that during the time when he and Ms Lopes were together, she only ever worked part-time and she has "certainly done agency work" at some stages. However at [20], the Appellant is recorded as saying (possibly discussing the employment relating to 2013/2014) that Ms Lopes "worked varying hours but generally five or six hours, four or five days per week".

17. An analysis of the P60s show the following documented earnings for Ms Lopes:

2009/2010	£2,410
2010/2011	£3,699
2011/2012	£4,530
2012/2013	£4,401
2013/2014	£5,772

Thus, for example taking the year ending 5th April 2010 and applying the relevant minimum wage of £5.80 per hour applicable at the time, this equates to her working on average only around eight hours per week.

18. A further analysis applied to Ms Lopes' employment at Alvonso Davis shows that payslips were produced for the period May 2014 to September 2014. These showed five months' earnings at £350 per month (there was no payslip for April 2014). Thus the earnings at Alvonso Davis amounted to £1,750 by the end of September 2014 which, if extrapolated to the tax year end, would show annual earnings of £3,850. This falls far short of what the Appellant said in evidence, which was that Ms Lopes generally worked five to six hours a day, four to five days per week. The minimum hourly wage during the relevant period in 2014, assuming she was over 21 years of age, was £6.31 per hour. Using the average given in the Appellant's own evidence, she worked 5½ hours per day on 4½ days per week. Even if one were to factor in 4 weeks of unpaid leave in the year, this would equate to £7,500 whereas the projected amount at Alvonso Davis equates to £3,850 per annum only.

19. I am bound to say that the discrepancies identified in the above two paragraphs raise a substantial question mark over whether Ms Lopes had been in continuous employment throughout the requisite period. This question remains unanswered. The plain fact is that there is a conspicuous lack of evidence in this appeal – evidence

detailing Ms Lopes' employment history. Mr Okoroh did not seek to address me on these apparent discrepancies in the evidence but simply urged upon me that the "bare statements of the P60s" and the pay slips produced were sufficient evidence to show that the FtT Judge had erred in dismissing the appeal. I find that the reverse is true. The judge has properly dealt with the evidence before her.

20. Mr Okoroh has characterised the judge's findings as speculation in the sense that when talking about the P60s she says that they give the total earned in the tax year and do not account for gaps in employment or time off work generally. That wording may have been better phrased had the judge confined her remarks to pointing out that the Appellant's own evidence is lacking in demonstrating a proper knowledge of Ms Lopes' employment history, but the result would have been the same.

21. The judge is correct in her conclusion that the evidence before her did not demonstrate that the Appellant had on balance discharged the evidential burden upon him. Therefore for the foregoing reasons, it follows that the appeal before me must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 17th October 2016 contains no material error of law. The decision therefore stands.

No anonymity direction is made.

The FtT's decision to make no fee award stands.

Signed C E Roberts Date 16 July 2017

Deputy Upper Tribunal Judge Roberts