Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20327/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 April 2017	**On 9 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KEMDI CHINAKA CHIKWEZE
(ANONYMITY DIRECTIONNOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer.
For the Respondent: Mr J Gifford Head, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the Respondent" and Mr Chikweze as "the Appellant".

2. The Appellant is a citizen of Nigeria who appealed against a decision of the Respondent to refuse to issue a permanent Residence Card to a person asserting a permanent right of residence, Regulation 15 of the Immigration (European Economic Area) Regulations 2006, as amended. The Respondent having refused the application not being satisfied that the

Appellant's ex-wife was exercising Treaty rights for the requisite period up to the time of their divorce on 11 November 2014.

3. The Appellant's appeal was heard by Judge of the First-tier Tribunal Ian Howard who in a decision promulgated on 26 September 2016 allowed it under the Regulations.

4. The Respondent sought permission to appeal which was granted by Judge of the Tribunal Saffer in a decision dated 31 January 2017. His reasons were:

> "1.The Respondent seeks permission to appeal against a decision of First-tier Tribunal Judge Howard promulgated on 26 September 2016 whereby the appeal against the decision to refuse to grant an EEA Residence Card was allowed.
>
> 2. I am satisfied that the application is in time and it was received on 3 October 2016.
>
> 3. It is arguable that there was insufficient evidence to justify the finding that the Appellant's former spouse had been exercising EEA Treaty Rights for the requisite period."

5. Thus the appeal came before me today.

6. Regulation 10 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") sets out the requirements to be met by a family member who has retained the right of residence. Regulation 10 has been substantially re-enacted in the 2016 Regulations (in force from 1 February 2017). The burden of proof for establishing that the requirements of the Regulations have been met rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. Facts and matters to be taken into account are those which exist at the date of hearing the appeal.

7. Regulation 10(5) states:-

> *"Family member who has retained the right of residence"*
>
> *10 - (5) A person satisfies the conditions in this paragraph if—*
>
> *(a)he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;*
>
> *(b)he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;*
>
> *(c)he satisfies the condition in paragraph (6); and*
>
> *(d)either—*

(i)prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii)the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii)the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv)the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

8. There is no challenge to the legal background set out at paragraphs 9, 10 and 11 of Judge Howard's decision. In order for the Appellant to succeed in his appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002, in the context of the 2006 Regulations, the Appellant was required to prove that he had the right to remain in the context of the requirements as set out in the regulation under which he claims that right, namely Regulation 15. In order to satisfy Regulation 15(1)(f) he had to show that he had a retained right of residence in accordance with Regulation 10(5). The Judge then correctly set out the burden and standard of proof. Ms Isherwood began her submissions by relying upon the grounds seeking permission to appeal. I set out deliberately the relevant parts:-

"**Failing to resolve conflicts of fact on a material matter**

3. The Immigration Judge found in paragraph 30 that they were satisfied that at the time of the appellant's divorce in November 2014 the former spouse had been exercising Treaty rights continuously since the time of the Appellant's application for a residence card as the family member of an EEA national in November 2008.

4. The Immigration Judge has drawn this conclusion with evidence provided by the appellant (paragraph 16) of a letter from Mamfe Global Net Ltd dated 06/10/2014, and payslips from the same firm in her name for the period July to November 2014.

5. Whilst it is accepted the sponsor would have been exercising Treaty rights at the time of the appellant's original residence card application being granted in November 2008. It is respectfully submitted that the Immigration Judge has not adequately considered and reasoned the lack of evidence that has been

provided by the appellant to show the ex-spouse was exercising Treaty rights for a continuous period up to the date of 15/04/2014 (date on letter from employer that ex-spouse started with the company).

6. It is respectfully submitted that the Immigration Judge should have sought more evidence that the appellant's ex-spouse had been continuously exercising Treaty rights for the full five year period before making the finding.

7. Permission to appeal is sought.

8. An oral hearing it requested."

She argued that it was necessary to assess whether the Appellant had shown that his partner had the necessary continuous period of residence pursuant to Regulation 10 and 16. At paragraph 6 of the Judge's decision he had relied on no more than a letter and payslips which was the only evidence that went toward this issue. It was necessary, she argued, that the Appellant showed that he had done everything possible to secure this information. This was not an "**Amos**" case. She was referring to **Amos v SSHD [2011] EWCA Civ 552**. The Judge here had only two items of evidence and within his decision he had given insufficient reasoning as to how the Appellant met the requirements of the Regulations. She then went on to refer me to aspects of the Appellant's original application and the Respondent's own policy.

9. Mr Gifford Head argued that there was no material error of law whatsoever within the Judge's decision. The central issue was whether the Appellant's former wife had been exercising Treaty rights for a period of five years. The Judge dealt with the evidence at paragraph 15 of his decision and the starting point was the issue to the Appellant of an EEA Residence Card as a family member of an EEA national on 13 April 2010. On the basis of the evidence that was before him which was in fact two-fold namely a letter from Mamfe Global Net Ltd dated 6 October 2014 confirming the Appellant's wife's employment with that firm from 15 April 2014 and payslips in her name for all of the period July to November 2014 the Judge was entitled to come to the decision that he did. He too then went on to refer me to issues relating to the Appellant's own policy and the authority that the Judge relied on being **Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC)**.

10. It is important to focus on the grounds upon which permission to appeal was granted. They are set out above. It is asserted that the Judge has not adequately considered and reasoned the lack of evidence that has been provided by the Appellant to show his ex-spouse was exercising Treaty rights for a continuous period up to the date of 15 April 2014 and that the Judge should have sought more evidence. The burden of course was upon the Appellant to prove his case to the required standard and not for the Judge to either seek more evidence or indeed adjourn for more evidence. The Judge had to make a decision on the evidence that was before him. It

is also important to recognise the grounds do not assert irrationality or indeed disclose any other argument beyond that I have referred to.

11. The Judge has relied upon **Samsam**. Paragraphs 30 and 31 of that judgment state:-

> "30. In this case the Appellant was the spouse of an EU national and a family member under Article 2(2)(a) of the Directive. He was therefore entitled to the issue of a first residence card on presentation of his valid passport, a marriage certificate, and "the registration certificate or any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining" (Article 10 of the Directive).
>
> 31. He satisfied the Secretary of State of these matters in 2002 when his first residence card was issued for five years as required by Article 11(1) of the Directive. The wife's registration certificate as an EU worker or self employed person would have been sufficient evidence of her status although other means of proving it are permitted. The 2007 application form, now before us shows that at least one wage slip for the wife was presented that was sufficient to satisfy the Home Office that the wife was continuing to exercise Treaty rights as a worker and hence a further residence card was issued for five years in November 2007. This is, therefore, not a case of an applicant arguing that he can prove that he was exercising residence rights in 2007 merely on the strength of having been issued with a card in 2002."

He has then taken into account the employer's letter and wage slips and noted that the Respondent made one enquiry of her own of the employer namely to call the number provided. However, no enquiry was made of the HMRC, given the payslips assert both income tax deductions and national insurance contributions were being made. Thus, and importantly in my view, the Judge was entitled to record that the Appellant was not arguing that his wife was exercising Treaty rights before 2014 merely on the strength of his having been issued with a Residence Card in April 2010.

12. The Judge has then gone on to weigh the totality of the evidence and on the civil standard has found that at the time of the divorce in 2014 the former spouse of the Appellant had been exercising Treaty rights continuously since the time of the Appellant's application for a Residence Card as the family member of an EEA national in November of 2008. So combining that with the Appellant's employment since December 2013 he was satisfied that the requirements of Regulation 15(1)(f) were met. I find he was entitled to come to that decision which was open to be made on the evidence that was before him. The grounds seeking permission to appeal do not identify a material error of law. There is disagreement with the decision that Judge Howard came to which was one that was not outside the range of reasonable responses to the evidence before him.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity direction is made.

Signed Date 8 May 2017

Deputy Upper Tribunal Judge Appleyard