Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03153/2017
EA/04871/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons promulgated**
On 1 October 2018	**On 22 October 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SUNDAY EBENEZER ADEBESIN
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Goldborough of NR Legal Solicitors
For the Respondent: Mr T Wilding Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge White promulgated on 22 May 2018 in which the Judge dismissed the appellants appeal.

Background

2. The appellant is a citizen of Nigeria born on 1 May 1982 who entered the United Kingdom as a student. On 21 July 2011 the appellant married a Portuguese citizen who was exercising treaty rights in the United Kingdom by way of a customary marriage conducted by proxy in Nigeria. On 5 October 2012 the appellant married the same person in a civil ceremony in the United Kingdom following which, on 4 July 2013, he was issued with a residence card as a family member of an EEA national exercising treaty rights. The couple, however, separated and on 11 July 2016 the marriage was dissolved.

3. On 30 August 2016 the appellant applied for a permanent residence card as a family member who retained the right of residence on divorce having completed 5 years residence in accordance with the regulations. The application was refused on 11 March 2017. On 22 March 2017 the respondent revoked the appellant's residence card against which the appellant appealed to the First-Tier Tribunal. The Judge noted that whilst the above appeals are pending the appellant made four further applications for a residence card on the basis of a retained right of residence, two of which were rejected for procedural defects and two refused on the basis the appellant had been unable to provide an original passport ID document for the EEA national.

4. The Judge sets out findings from [8] of the decision under challenge in which it was found there was no doubt the appellant was a family member of the EEA national for the purposes of the regulations [9].

5. The Judge records at [14] *"the real issue in these appeals is whether Ms Dionisio was exercising treaty rights up to and at the date of divorce. If she was not exercising treaty rights over a continuous period prior to the divorce the appellant would not have been residing continuously in accordance with the 2006 Regulations, which he needs to have done for a total of 5 years. If she was not exercising treaty rights at the date of the divorce he would have no right capable of being retained at that point, and nothing that happened before or afterwards could remedy that."*

6. The Judge considered the evidence provided of the EEA national's work and self-employment at [15 – 17] before concluding at [18 – 21]:

> "18. It is not necessary, to be regarded as a worker or self-employed person, to earn an amount equal to the minimum wage, or an amount sufficient for one's own maintenance. It is necessary to show involvement in genuine and effective economic activity, rather than something which generates what might be described as pocket money. I have no doubt that Ms [D]'s earnings in 2013/14 were a result of genuine economic activity. It is certainly arguable that her earnings in the two previous years should also be so classed. It is less clear that this is true of 2014/15, when the earnings evidenced are less than £3000 for the year - it is possible that she also did some work for New Dawn, given that she worked extensively for them the year before and still did a very small amount in the period after, but that is

> supposition. I have no evidence for it. When I come to the period from 6 April 2015 the evidence indicates that she was employed for about 4 months, earning £2900, which would seem to be genuine economic activity. She then turned to self-employment from the end of July, with the income noted above. I note what the appellant said about seeing clients 2 to 3 times a week, but the evidence of the figures is that she was earning a tiny amount, significantly less than the income support level. I am not persuaded that this can be classed as genuine economic activity.
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> 19. I am accordingly satisfied that Ms Dionisio was no longer a worker after about July 2015 but I am not satisfied that she could be described as self-employed thereafter. She was not, therefore, a qualified person during the period of roughly a year up to and including the divorce. I am also not satisfied that it has been shown that she was a qualified person for a continuous period of 5 years prior to stopping work in July 2015, and I do not therefore find that she had already acquired a right of permanent residence herself. The effect is that at the date of divorce she was not a qualified person and the appellant had no right of residence which he could retain. Since he cannot show the acquisition of a right of permanent residence prior to that he was not entitled to the permanent residence card for which he applied.
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> 20. It further follows that the respondent was correct to conclude that on divorce he ceased to have a right to reside. The conditions for revocation of his residence card was therefore made out. Mr Goldborough referred to the respondent's guidance on revocation in support of a submission that such a course is not automatic, but I can see nothing in the guidance to suggest reasons why a card should not be revoked once it becomes clear that the right to reside has been lost.
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> 21. I therefore find that the respondent was correct to refuse the application, and correct to revoke the existing residence card, and that both appeals, under the 2006 and 2016 Regulations, must fail."

7. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal on 20 August 2018.

Error of Law

8. The appellant challenges the decision on two grounds the first of which is an assertion the Judge erred in dismissing the appeal "on immigration grounds" as this is an application under the European Directive and not under domestic immigration provisions. The Judge at [23] states "*this appeal is dismissed on immigration grounds*". This is not a decision to dismiss the appeal under the Immigration Rules, as the appellant clearly interprets that statement, but rather a generic statement by the Judge. A reading of the determination clearly shows the Judge was not assessing the merits of the appeal by reference to the Immigration Rules and notes at [2] that the appeal is made pursuant to the

relevant Immigration (European Economic Area) Regulations. No arguable legal error arises on this point.

9. The second ground asserts the assessment of the EEA national's position as a qualified person or entitlement to a right of permanent residence at the date of divorce is flawed; arguing the Judge posed his own question rather than the current one which is whether based upon the evidence provided the EEA national, Ms Dionisio, was a qualified person at the date of divorce and whether she had acquired a right of permanent residence at the date of divorce. The appellant challenges the Judges finding that the EEA national was not a qualified person at the date of divorce by reason of non-genuine economic activity when the evidence showed the EEA national was self-employed on the basis of tax returns dated August 2016 which showed a declared turnover was £2460 i.e. profit of £45 a week. The appellant's case is this shows the business was failing but did not show that the economic activity was marginal nor non-genuine nor just providing pocket money. The appellant asserts the EEA national had also acquired a right of permanent residence as she had been residing in the United Kingdom since 25 April 2008 and had worked both on an employed and self-employed basis. Tax returns have been provided from 2010 showing an acquisition of a right to permanently reside at the time of the divorce, supporting the appellant's contention that has a retained a right of residence at the date of divorce and that the appeal should have been allowed.

10. Mr Goldborough was asked to confirm the relevant 5-year period in this appeal which he claimed was from 5 October 2012 to issue in February 2016. He argued that the evidence showed that EEA national was economically active during the relevant period and that the Judge misunderstood the evidence, making a material error of law.

11. It is settled law that for a person to satisfy the definition of a 'worker' in the Regulations there is a requirement for the work being undertaken to be "genuine and effective" rather than "marginal or ancillary" which is a question of fact to be determined in each case. The relationship between the level of income and work undertaken can be assessed by establishing an economic measurement of effectiveness although this need not demonstrate a person is self-sufficient or any relationship to the level of the minimum or living wage. It is important also with a person who is self-employed that in addition to periods of actual work and remuneration there is a requirement to undertake administrative, marketing and related business development activities all of which, if evidenced, should be taken into account.

12. It is not made out on the evidence made available to the First-Tier Tribunal that any claim was made in relation to the EEA national other than that of direct economic activity.

13. The Judge considered the period of the tax years 2015/16 at [17 – 19] of the decision under challenge. The period 2014/15 appears on the evidence to be the

last tax year during which the EEA national was employed as a worker. From April 2015 to the period of the divorce the EEA national was employed for a period of 4 months only, which is not disputed.

14. The difficulty recognised by the Judge is that from 11 July 2015 the EEA national claims to have become self-employed but failed to disclose evidence of genuine economic activity on the facts. It is not made out this conclusion is arguably perverse, irrational, or contrary to the evidence, and was arguably within the range of findings open to the Judge on that evidence. In the absence of further evidence from the EEA national as to what she was actually doing during this relevant period no arguable legal error is made out.

15. Mr Wilding referred in his submissions to the fact there is still no evidence, even now, showing the EEA nationals business was up and running to support the claim it was a starter business or one during a period of development when orders and levels of income would understandably be reduced, or one that was a viable successful commercial entity that was failing. It is not an arguably irrational finding to conclude that the evidence did not demonstrate a business in its infancy with a slow start but relevant economic activity.

16. I find no arguable error in the conclusion reached by the Judge which answers the first question the Judge was required to consider, whether the EEA national was a qualified person at the date of divorce, which is that she was not.

17. It follows that if the appellant had no right under the regulations at the date of divorce proceedings or even decree absolute he had no right to retain as he had not established that the EEA national was a qualified person for the relevant period. The status of the EEA national not establishing a right that existed at the relevant period that the appellant could retain on divorce is the relevant point at which the Judge finds against the appellant.

18. If the appellant has not demonstrated a right to remain in the United Kingdom under the regulations it is arguably rational for the respondent to conclude that the residence card previously issued as recognition of such a right could lawfully be revoked.

19. The evidence required for the appellant to establish his claim had simply not been produced to the Judge.

20. The challenge to the removal of the applicant from the United Kingdom does not make out arguable legal error. As the appellant has no right to remain in the United Kingdom on any basis operation of law requires his removal. If the appellant claims he should be entitled to remain on the basis of the length of time he has been in the United Kingdom, which must equate to a private life claim, it is open to him to make a fresh application for leave to remain on such basis.

Decision

21. There is no material error of law in the Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 18 October 2018