



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

Appeal Number: EA/04005/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 September 2018**

**Decision & Reasons Promulgated  
On 13 November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**MR TERRY OWUSU TAY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Jibowa, Counsel for MJ Solomon & Partners, Solicitors,  
London

For the Respondent: Mr Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Ghana born on 1 May 1982. He appealed the respondent's decision dated 10 February 2016 refusing to issue a residence card to enable him to qualify for permanent residence in the United Kingdom under a retained right of residence following his divorce from an EEA national, under the Immigration EEA Regulations 2016. His appeal was heard by Judge of the First-Tier Tribunal James on 16 April 2018 and dismissed in a decision promulgated on 15 May 2018.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Grimmett on 23 July 2018. The permission states that it is arguable that there was a procedural error as it appears the Judge had before him a bundle of documents lodged in respect of appeal number EA/09495/2016 which the appellant had withdrawn. A correct bundle was on file but seems to have been overlooked.
3. There is no Rule 24 response.

### **The Hearing**

4. Counsel submitted that the hearing was dealt with by the First-Tier Judge on the papers. He submitted that the First-Tier Judge relied on evidence produced for the claim EA/09405/2016 which had been withdrawn by the appellant instead of the correct evidence relating to EA/04005/2017. He submitted that the Judge therefore ignored the supporting submissions and bundle of documents for the paper hearing as well as the schedule of the supporting documents.
5. The grounds refer to the Judge stating that there was no decree absolute before him but that was not the case as item 11 of the appellant's bundle of documents refers to a decree absolute and the same error is reiterated in paragraph 13 of the decision. He submitted that the appellant has shown that he is now divorced but the Judge found that the appellant had not demonstrated that he had been engaged in employment since the date of the divorce up until the date of the new application.
6. Counsel submitted that the date of the decree absolute is 24 February 2015 and the application was made on 26 September 2016. I was referred to the bank statements and the tax returns and Counsel submitted that there is evidence of the appellant working from February 2015 until September 2016 and then up to April 2017. He submitted that had the Judge looked at the correct bundle the appeal would have succeeded and this must be a material error of law and the First-Tier Judge's decision should be set aside.
7. The Presenting Officer submitted that there was an administrative mix up but there is no evidence of the original appeal having been withdrawn. He submitted however that the appeal before the Judge is EA/04005/2017 and the Judge appears to have considered the wrong bundle from the appellant and he submitted that this is an error of law and what has to be decided is whether it is material.
8. He submitted that the Judge states that the EEA national's P60 for 2015 was not decipherable and the copy before the Judge was a bad copy. He submitted that it was therefore not clear whether the EEA national was exercising Treaty Rights at the date of the divorce and so the appeal for a permanent right of residence would have been dismissed anyway. He submitted that based on both bundles there is no evidence of the EEA national working for five continuous years. He submitted that although there is an error it is not a material error.

9. Counsel submitted that it is not clear whether the original P60 was before the Judge. Her submitted that the original is in the correct bundle. The original P60 is not in the correct bundle before me, only the illegible copy. He submitted that the issue is the appellant's employment. I was referred to the refusal letter dated 27 March 2017 which states that the respondent accepts that the EEA national sponsor was exercising Treaty Rights at the point of the divorce on 24 February 2015. He submitted that it is clear from the evidence in the bundle that the appellant has been working for Uber and I was referred to the tax returns in the bundle. Counsel submitted that these are supported by the bank statements. He submitted that the appellant has provided proof of his work from February 2015 to April 2017 so he has been working from the date of the divorce. He submitted that there are HMRC documents in the correct bundle and his earnings are shown in his Nationwide bank statement. He submitted that the evidence covers not only the appellant working at the date of divorce but also working from March 2015 to April 2016 and from May 2016 until September 2016.
10. He submitted that what is necessary for this appeal to succeed is evidence that the appellant has been working since the date of the divorce and before the date of the application as the respondent is satisfied that the sponsor was working until the date of the divorce. He submitted that there is evidence that the appellant has been residing in the United Kingdom in accordance with the Regulations for five continuous years and he should be granted a right of residence. He submitted also that the appellant has continued to work.
11. I was asked to take into account the fact that the appellant was granted a residence permit from 2010 and when the P60s are considered along with the bank statements and tax returns the appellant has actually demonstrated that he has been working for 7 years, so the burden has been discharged beyond the required standard and had the Judge considered the correct bundle at the paper hearing that would have been clear.
12. The Presenting Officer made his submissions submitting that the appellant may have a retained right of residence but based on what the Judge considered there was insufficient evidence to show that he should be granted a right of permanent residence in the United Kingdom.
13. Counsel submitted that Regulation 15(1)(f) has been satisfied and a permanent right of residence should be granted to a person who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. He submitted that the original permit was granted in 2010 and the appellant has been working since then. He submitted that Regulation 15(1)(f) must have been satisfied.
14. I was referred to the case of ***OA (Nigeria)*** [2010] UKAIT 00003 and headnote 5 thereof which states that Regulation 15(1)(f) provides a route for acquiring permanent residence based in part on a retained right of residence. Under Regulation 15(1)(f) the family member has to show that he was residing in the United Kingdom in accordance with the Regulations

for a continuous period of five years and at the end of that period he has a retained right of residence.

15. Counsel asked me to set the First-Tier Tribunal's decision aside and remake the decision.

### **Decision and Reasons**

16. It is accepted by both parties that the First-Tier Tribunal Judge relied on the wrong evidence by considering a bundle which had been submitted for case number EA/09405/2016 which the appellant states he has withdrawn.
17. The Presenting Officer submitted that this is an error of law but it may not be a material error of law.
18. I have considered the evidence which should have been before the Judge. The refusal letter makes it clear that the respondent has accepted that the sponsor was exercising her Treaty Rights up to the date of divorce. There was a divorce decree on file before the Judge. What I have to consider is whether the appellant has satisfied the terms of the Regulations and the relevant Regulation is 15(1)(f) of the 2016 Regulations.
19. I have noted the appellant's P60 documents from 2010 until 2014 and the bank statements which show entries from Uber and Gymkhana Restaurant until 12 March 2015. Evidence has also been provided that the appellant has continued working and there is 7 years' worth of evidence on file satisfying this. I have noted his tax returns and I find that based on this evidence the appellant satisfies the requirements of paragraph 15(1)(f) of the Immigration EEA Regulations 2016 as he has resided in the UK for a continuous period of 5 years and has a retained right of residence by virtue of his divorce in line with Regulation 10.
20. With regard to a permanent right of residence, as this appellant has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years he has retained a right of residence and I find that the terms of Regulation 15(1)(f) have been satisfied and this is a route for the appellant to acquire a permanent right of residence based in part on his retained right of residence.
21. I find that there is a material error of law in the First-Tier Judge's decision. He considered the wrong bundle of evidence and because of that he dismissed the appeal. Had he considered the correct bundle and the additional evidence therein, I find that his decision would have been different.

### **Notice of Decision**

As there is a material error of law in the First-Tier Tribunal's decision I am remaking that decision and I am setting the First-Tier Judge's decision promulgated on 15 May 2018 aside.

This appeal is allowed.

No anonymity direction is made.

Signed  
Deputy Upper Tribunal Judge Murray

Date 5 November 2018

A handwritten signature in cursive script, appearing to read "David Murray".