Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05121/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2018	**On 11 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

PRINCE ASIEDU
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Malhotra, Counsel instructed by Mensons & Associates
Solicitors
For the Respondent: Mr S Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent not to grant him a registration certificate as confirmation of a right of permanent residence as the former family member of an EEA national pursuant to Regulations 6 and 15 of the Immigration (European Economic Area) Regulations 2016.

2. The appellant is a Ghanaian citizen and his former spouse was a French citizen, thus an EEA national. They married on 1 October 2010 in Accra, Ghana, and he was granted a residence card as the family member of an EEA national on 25 November 2011, expiring on 25 November 2016. That residence card did not itself confer status, but for so long as the appellant remained married to his EEA national spouse and they were both in the United Kingdom in accordance with the Regulations, it evidenced his rights as her family member.

3. The respondent's letter dated 25 November 2011 accompanying the endorsement on the appellant's passport of his status as an EEA family member said this:

> "At present your only claim to remain in the United Kingdom is as the family member of an European Economic Area (EEA) national who is exercising Treaty rights here. If your family member decides to leave the United Kingdom, or ceases to exercise Treaty rights, or if you cease to be a family member, you would have to qualify to remain in the United Kingdom in your own right. This Directorate should be notified immediately if your family member decides to leave the United Kingdom, or ceases to exercise a Treaty right here, or if you cease to be a family member."

4. Unhappy differences having occurred, the marriage came to an end in 2015. It seems that divorce proceedings began during 2015, ending with a decree absolute on 7 September 2015. As is unfortunately very common, the appellant's former spouse has not cooperated by providing evidence of her exercise of Treaty rights during the period of 4 years and just over 11 months that they were married. Nor is there any evidence of exactly when the parties entered the United Kingdom and began living here in accordance with the Regulations.

First-tier Tribunal decision

5. The First-tier Tribunal refused to adjourn the hearing and direct the respondent to seek the relevant tax returns from HMRC.

6. A friend of the appellant, a Mr Benwell, had somehow obtained 4 years' worth of HMRC records regarding her income, but the HMRC record for the tax year 2014/2015 was missing. Understandably, the appellant addressed himself to the 7 September 2015 decree absolute date, not the earlier date of issue, but in any event, one whole year's tax returns were missing and there was no evidence about his own status after the marriage ended.

7. The First-tier Judge found that the appellant had not met the requirement of Regulation 15(1)(a) of the Regulations, that he demonstrate that he had resided in the United Kingdom in accordance with the Regulations for a continuous period of 5 years and the appeal was dismissed.

8. The appellant appealed to the Upper Tribunal.

Permission to appeal

9. The grounds of appeal make two mutually incompatible criticisms of the decision of the First-tier Tribunal, first that the missing 2014/2015 HMRC record was provided, and second, that the First-tier Tribunal unfairly refused an adjournment and refused to direct the respondent to ask HMRC to produce it.

10. Permission to appeal was granted on the following basis:

> "The grounds of appeal contend that HMRC documents for 2014/2015 were lodged and furthermore the Judge had not given adequate reasons for refusing an adjournment. Finally, it is said the Judge did not make sufficient findings.
>
> The Judge said that the records for the year April 2014 to April 2015 were missed out and since the issue is a material one, permission to appeal is granted for reasons given in the grounds. Plainly the Judge could not be faulted if the records were not before him.
>
> The Judge gave reasons for refusing the adjournment but for the sake of clarity, permission to appeal is granted on all grounds. "

Rule 24 Reply

11. The respondent did not file a Rule 24 Reply to the grant of permission to appeal.

12. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

13. At the hearing, I heard submissions from Ms M Malhotra and from Mr Walker for the respondent. I have seen the bundle which was relied upon before the First-tier Tribunal which forms a discrete element of the bundle prepared for the Upper Tribunal proceedings. I have also seen [2] and [11] of the decision of the First-tier Judge which state that the employment records produced for the wife ran only from 2010 to 2014, missing out the tax year April 2014 to April 2015. The grounds of appeal assert that this is not true, but there is no evidence beyond that assertion and none of the spouse's employment records appear in the bundle prepared for the First-tier Tribunal.

14. I asked whether the appellant had any evidence with him about his status after the *Baigazieva* date, the date of issue of the divorce proceedings, or whether he could confirm when that was. He could not.

Analysis

15. These grounds of appeal are a challenge to the First-tier Tribunal's finding of fact that the appellant had not demonstrated 5 years' residence in the United Kingdom in accordance with the Regulations, because his former spouse's HMRC records for 2014/2015 were not produced.

16. On the evidence before me, the appellant has not met the standard for interference with a the First-tier Tribunal's finding of fact that the 2014/2015 HMRC records were not produced (see judgment of Lord Justice Brooke at [90] in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982). The First-tier Judge's reasoning is neither perverse nor *Wednesbury* unreasonable, nor contrary to the evidence, nor a decision which I cannot understand, and accordingly the Upper Tribunal has no power to interfere with the decision of the First-tier Tribunal and this appeal is dismissed.

17. In any event, the refusal to adjourn and direct the respondent to obtain that record, challenged in the grounds of appeal, is a clear indication that the document was not present and that the appellant is not telling the truth when he says it was there. I am not satisfied that any proper reason has been shown to go behind the plain statement in the decision of the First-tier Judge that the 2014/2015 HMRC record was not before him.

18. Even if the 2014/2015 HMRC record had been present, the appellant would have been in difficulty. In order to establish a permanent right of residence, the appellant must show that he has resided in the United Kingdom in accordance with the Regulations for a period of 5 years (Regulation 15(1)(a)). He cannot do so in reliance on his wife's exercise of Treaty rights, because the marriage did not last for 5 years and the last date on which he can rely on her exercise of Treaty rights is the date of issue of the divorce petition (see *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088). The exact date of issue of the proceedings is not known, but the decree absolute bears a file number beginning WT15D and it is reasonable to assume that the divorce proceedings were lodged in the year 2015. Decree absolute was pronounced after 4 years 11 months of marriage, but the *Baigazieva* date (the date of issue of the proceedings) would have been somewhat earlier than that.

19. The appellant is entitled pursuant to Regulation 10(6) to include in the calculation of the 5-year period a period after the issue of the divorce proceedings during which were he an EEA national, he would be a worker, self-employed person or self-sufficient person as defined by Regulation 6, provided that, as here, the marriage had lasted for at least 3 years and the parties had resided in the United Kingdom for at least one of those years.

It is impossible to tell from the evidence which was before the First-tier Tribunal whether the appellant would be able to meet the Regulation 10(6) test: he waited for his residence card as a spouse, granted in 2011, to expire in 2016 and then then applied for a permanent right of residence without any evidence of his own economic activity after the divorce petition was issued.

20. If the appellant does have evidence of his status as a worker, self-employed or self-sufficient person from the date of issue of the divorce petition to the 5th anniversary of his being in the United Kingdom in accordance with the Regulations (which may be 2010 or 2011, that is not clear from the evidence before me), then it is open to him to make a fresh application and produce all the relevant evidence.

21. The appellant's challenge to the decision of the First-tier Tribunal in this appeal cannot succeed and the appeal is dismissed.

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. The decision of the First-tier Tribunal stands.

Signed: Judith A J C Gleeson Date: 28 November 2018

Upper Tribunal Judge Gleeson