



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

Appeal Number: EA/08372/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2 March 2018**

**Decision & Reasons
Promulgated
On 5 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MR ADEWALE ADESINA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Nelson-Iye, Legal Representative
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Herlihy dismissing his appeal against the decision of the respondent dated 17 June 2016 to refuse to issue a residence card as the family member of an EEA national, his brother, Mr Ademola Mosudi Adesina, a national of Belgium pursuant to provisions of Regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("The EEA Regulations").

2. The respondent doubted that the EEA sponsor was employed as claimed. The respondent also considered the application under Regulation 8(2) of the EEA Regulations and noted that the appellant had submitted extensive evidence of his residence in the UK but found that the appellant had failed to provide any evidence of dependency on his EEA sponsor in the UK.
3. Permission was granted on the basis that it is arguable that the judge may not have considered all the documentary evidence relevant to the issue of the appellant's sponsor exercising EEA treaty rights.
4. The appellant is a citizen of Nigeria, born on 6 December 1982. On 8 December 2015 his solicitors applied on his behalf for a residence card as a confirmation of a right to reside in the United Kingdom
5. The judge heard oral evidence from the appellant which she recorded at paragraph 6 of her decision.
6. The judge set out her findings at paragraph 7.
7. The judge said that the respondent refused the application as she was not satisfied that the EEA sponsor was exercising treaty rights in the United Kingdom. The judge said she had considered the totality of the evidence before her and noted from the interview the appellant had with the Department for Works and Pensions that the appellant said his brother was in Belgium in 2013 and that he had gone to Nigeria in 2011. The appellant submitted no evidence of the sponsor's bank statements and payslips or other evidence to support his claim that the EEA sponsor was in the United Kingdom, other than evidence of a wage slip and P60 and P45 dating from 2009 and a single letter from HM Revenue and Customs dated February 2014 advising the EEA sponsor of his tax code.
8. The judge said that the appellant produced no statement from his brother or any evidence to corroborate the claim that his brother was exercising treaty rights in the United Kingdom or has been in the United Kingdom since 2009. It was the appellant's evidence to DWP that his brother had gone to Nigeria in 2011 and to Belgium in 2013.
9. The judge did not find the appellant's claim that his brother was living in the United Kingdom but only receiving medical treatment in Belgium as this was contradicted by his interview to the DWP. The appellant claimed he was dependent for everything upon his brother and received funds from his brother but again produced no evidence to support his claim and it was completely undermined by the evidence from the Royal Borough of Greenwich which demonstrated that the appellant was housed by them and was in receipt of financial support from them pursuant to Section 21 National Assistance Act 1948 as a person with nil recourse to public funds.
10. The judge was not satisfied that any satisfactory evidence has been submitted that the EEA sponsor was resident in the United Kingdom or

that he was a worker or self-employed person who has ceased activity. There was no evidence in respect of the EEA sponsor save for the documents dated in 2009 and the single letter from HM Revenue and Customs dated February 2014 to indicate that he was in receipt of any income or that he had ceased activity as a result of a permanent incapacity to work.

11. The judge noted that the appellant had been granted a residence card which was issued on 14 December 2010 until 14 December 2015 and it was submitted that he has acquired a right of permanent residence having lived in the United Kingdom for five years as a family member of his brother. However, the judge did not find that the appellant has established that he was living in the United Kingdom either as a family member or other family member of his brother in accordance with the EEA Regulations as there was no satisfactory evidence that the EEA national was in the UK exercising treaty rights after 2009.
12. The judge said that the appellant had also raised a human rights claim in his grounds of appeal but noted that the Court of Appeal upheld decisions of both the First-tier and Upper Tribunal that human rights cannot form part of any EEA appeal (**Amirteymour v SSHD EWCA Civ 353**). The judge said the reasoning behind the Court of Appeal's decision is that the right of appeal (under Regulation 26(1)) is specifically a right of appeal against an EEA decision. The EEA appeal should focus on EEA law (note: the ruling relates to cases where there are no removal directions in place). The EEA Regulation that gives the right of appeal does not create a general arena where arguments on Immigration Rules and human rights can be raised.
13. Having considered all the evidence in the round the judge was not satisfied that the appellant has established that the EEA sponsor is exercising treaty rights and accordingly the appellant was not entitled to the issue of a residence card.
14. Mr Nelson-lye submitted that the only issue before the Tribunal was as set out in the first paragraph of the notice of immigration decision refusing to issue a residence card dated 17 June 2016. It said this:

"You have applied for a residence card as confirmation of a right of residence as a family member of an EEA national, but your EEA family member has failed to provide evidence that they are a qualified person as set out in Regulation 6 of the Immigration (EEA) Regulations 2006."
15. Mr Tarlow confirmed that this was the only issue before the Tribunal.
16. Mr Nelson-lye submitted that his first ground was in respect of the judge's decision at paragraph 7.1, which contains the respondent's reasons for refusing the appellant's application. He submitted that the respondent's reasons as to the lack of documentation from the sponsor were incorrect

as much more documentary evidence was submitted on behalf of the EEA sponsor. He said that documents at pages 62 and 63 of the appellant's bundle contained the sponsor's most recent Belgian ID card and his Belgian passport. At page 72 of the appellant's bundle were two sets of letters; the first was a letter from HM Revenue and Customs dated 17 March 2008. I note that this letter was asking the EEA sponsor whether he needed to pay tax on the interest on his savings in banks and building societies. The second letter was also from HM Revenue and Customs dated 8 September 2014 informing the EEA sponsor that he was due a repayment of income tax for the tax year 2013-2014.

17. Mr Nelson-lye referred to three further letters from HMRC dated 26 February 2014 informing the EEA sponsor of his new tax code, a further letter dated 26 February 2014 informing the EEA sponsor of his new tax code for the year from 6 April 2013 to 5 April 2014, and a further letter dated 8 September 2014 which has already been referred to telling him that he was due a repayment of income tax for the same tax year.
18. Mr Nelson-lye referred to a letter at page 299 which was a certificate stating that Ademola Adesina has been awarded a Level 1 Award in Coaching Football (QCF). The certificate was dated 20 May 2014.
19. Mr Nelson-lye referred to further documents – a letter in French from the Orthopaedic Department which he said was evidence of the sponsor receiving ongoing treatment in Belgium for the knee injury he suffered. Indeed, at page 109 is a scan of the EEA sponsor's knee.
20. Mr Nelson-lye submitted that these documents before the judge. The relevance of these documents he said are set out in the appellant's statement. The appellant said in his statement that he arrived in the UK in December 2002, clandestinely from Belgium. Prior to his arrival in the UK, he was a footballer in Nigeria. His brother Ademola Adesina is a Belgian national of Nigerian descent. He lived with his brother in Belgium prior to arriving in the United Kingdom. His brother was working with UPS in Belgium and was transferred to the UK branch in 2005 and started exercising treaty rights in the UK.
21. The appellant said at paragraph 11 of his witness statement that in 2012/2013 his brother had an accident at work and sustained a knee injury to his left leg. As a result of this injury he was unable to walk and left work. He was treated briefly in the UK but he later travelled to Belgium to obtain further treatment. His brother's family and children remained in the UK. His knee was operated on in Belgium around 2015. Further to the operation on his left knee, it was discovered that his right knee also had a problem. As a result, his right knee was also operated on around September/October 2017 and he is still receiving treatment. Mr Nelson-lye submitted that the evidence at page 108 relates to the sponsor's treatment in Belgium.

22. Mr Nelson-lye relied on Regulation 5(3)(a)(ii) to argue that as the appellant's brother continued to work until his injury and continues to be treated for his injury, he remains a qualified person both at the time of application and at the time of hearing. He submitted that there was sufficient information before the judge to support the fact that the EEA sponsor is a qualified person and consequently the appellant is entitled to a residence permit.
23. He submitted that the failure by the judge to consider Article 8 was an error of law. He relied on the decision in **Khan [2017] EWCA Civ 1755**. Mr Nelson-lye submitted that whilst they could not argue Article 8, because of **Khan** there was an exercise of discretion which the Secretary of State could have undertaken in respect of the family. He submitted that the Secretary of State did not exercise her discretion.
24. Mr Tarlow submitted that the judge's decision disclosed no material error of law.
25. The appellant's application for a residence card as confirmation of a right of residence as the family member of an EEA national was refused under Regulation 6(1) and Regulation 8(2). Regulation 6 defines, "qualified person" as follows:
- "6-(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as -*
- (a) a jobseeker;*
- (b) a worker;*
- (c) a self-employed person;*
- (d) a self-sufficient person; or*
- (e) a student.*
- Regulation 6(2) states:*
- [Subject to Regulation 7A(4) and the alternative and 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if -]*
- (a) he is temporarily unable to work as the result of an illness or accident;*
- (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, for at least one year, provided that he*
- (i) has registered as a jobseeker with the relevant employment office; and*
- (ii) satisfies conditions A and B."*
26. Mr Nelson-lye did not rely on Regulation 6(2).
27. Mr Nelson-lye relied on Regulation 5(3):

“Worker or self-employed person who has ceased activity”.

It says at paragraph 5(3):

“A person satisfies the condition in this paragraph if -

- (a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work and*
- (b) either -*
 - (i) he resided in the United Kingdom continuously for more than two years prior to the termination; or*
 - (ii) the incapacity is the result of an accident at work or an occupational disease that entitle him to a pension payable in full or in part by an institution in the United Kingdom.”*

28. Mr Nelson-Iye relied on Regulation 5(3) because it appeared from the evidence that the EEA sponsor has terminated his activity in the UK as a worker as a result of his knee injury. Mr Nelson-Iye said that the EEA sponsor was relying on his savings to maintain himself financially. This meant that the EEA sponsor could not satisfy Regulation 5(3)(b)(ii).
29. The remaining question is whether the EEA national has resided in the UK continuously for more than two years prior to the termination.
30. I find that the documents relied on by Mr Nelson-Iye would not have made any difference to the judge’s decision. In particular the judge’s decision at paragraph 7.2 wherein the judge stated that the appellant produced no statement from his brother or any evidence to corroborate his claim that his brother was exercising treaty rights in the UK, or that he has been in the UK since 2009. The judge relied on the appellant’s evidence to DWP that his brother had gone to Nigeria in 2011 and to Belgium in 2013. Indeed, at paragraph 6.3 the appellant in evidence said he had no documents showing his brother was in the United Kingdom after 2009 other than a letter sent to his brother from HM Revenue and Customs dated 28 February 2014 at page 73 advising of tax codes. Mr Nelson-Iye relied on further documents from HM Revenue and Customs advising of tax codes but I find that these documents do not show that the appellant’s brother was in fact in the UK at the time he was being advised of his tax codes. The appellant said in his witness statement that as a result of his knee injury his brother has been unable to work since. Although the appellant claimed that this accident happened in 2012/2013, his evidence to DWP was that his brother had gone to Nigeria in 2011 and to Belgium in 2013. He said at paragraph 12 of his witness statement that his brother's knee was operated on in Belgium around 2015 and he had a further operation on the other knee in September/October 2017. So as found by the judge there was no evidence that has been produced by the appellant or drawn to my attention to indicate that the appellant’s brother has been in the United Kingdom since 2009.

31. Mr Nelson-lye relied on the certificate awarded to Ademola Adesina on 20 May 2014. Mr Nelson-lye said the certificate awarded to Mr Adesina for a course he undertook in football coaching. I find that this evidence falls short of establishing that the EEA sponsor was in the UK continuously for more than two years prior to the termination of his working activity in the UK. In any event, I find that the appellant's evidence was inconsistent in respect of his brother's residence in the UK. If, as the appellant said his brother's knee was operated on in Belgium around 2015, and his other knee was operated on in September/October 2017, there was no evidence that at the date the appellant made his application that is 8 December 2015, his EEA sponsor was resident in the UK, was exercising treaty rights and therefore a qualified person under Regulation 6 of the EEA Regulations.
32. I note that the judge's findings in respect of the refusal of the appellant's application under Article 8 of the EEA Regulations have not been challenged.
33. I also find that the judge did not err in law in her reliance on **Amirteymour v SSHD (EWCA) Civ 353** which held that the EEA Regulation that gives the right of appeal does not create a general arena where arguments on Immigration Rules and human rights can be raised.
34. For these reasons I find that the judge's decision does not disclose a material error of law.

Notice of Decision

35. The judge's decision dismissing the appellant's appeal shall stand.
36. The appellant's appeal is dismissed.

No anonymity direction is made.

Signed

Date: 28 March 2018

Deputy Upper Tribunal Judge Eshun