



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/09619/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 23 July 2018

Decision & Reasons Promulgated
On 2 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

OLUKOLADE AJAYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Graves) dismissing on the papers his appeal against the decision of the Secretary of State to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 as confirmation that he had a retained right of residence under Regulation 10 following his divorce from his EEA national spouse. The First-tier Tribunal did not make an anonymity direction, and I do not consider the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. Permission to appeal against the decision promulgated on 7 February 2018 was granted on 6 March 2018 by First-tier Judge Murray as it was arguable that the Judge's approach to the issue of documentation was in conflict with the guidance given in **Barnett and others (EEA Regulations: rights and documentation) [2012] UKUT 142**. However, while granting permission, Judge Murray also observed as follows:

"The materiality of this [error] may, however, be effected by the unchallenged finding that the Appellant had not retained a right of residence."

The Hearing in the Upper Tribunal

3. At the hearing before me to determine whether an error of law was made out such that the decision should be set aside, Mr Bates conceded that an error of law was made out as pleaded by the appellant in his grounds of appeal to the UT, but he submitted that the error was not material for the reason given by Judge Murray.
4. Although he had not challenged the adverse finding of Judge Graves on the underlying merits of his appeal, in answer to questions from me the appellant indicated that he did not accept that he had not provided sufficient evidence to show that his former spouse was exercising treaty rights at the time of divorce; or, alternatively, that she had not already acquired a permanent right of residence before the divorce through the continuous exercise of Treaty rights for a period of five years.
5. He said they had got married in September 2009, and he had been issued with a five year residence card in April 2010. They had stopped living together in October 2013, and the decree absolute had been issued on 30 December 2013. His last contact with her had been in 2014. The documents which he had provided to show that she had been working in the UK were those which she had left behind. He did not know her current whereabouts. She might be in Portugal, which was her country of origin.

Discussion

6. The respondent refused the application made on 4 September 2017 on the preliminary ground that the appellant had not satisfactorily demonstrated the nationality of his former spouse. As the application was refused on this preliminary ground, the respondent did not consider the documents relied on as showing the exercise of Treaty rights, and the appellant was invited to make a fresh application for substantive consideration, if and when the preliminary issue was satisfactorily addressed.
7. For the purposes of his appeal to the First-tier Tribunal, which he asked to be determined on the papers, the appellant produced his former spouse's original EEA registration certificate issued to her by the Home Office.

8. As conceded by Mr Bates, Judge Graves erred in law in holding that the appellant had not thereby adequately addressed the issue of the former spouse's nationality and identity. The Judge further erred in law in holding that the appellant ought to have provided their marriage certificate to show that he had been married to an EEA citizen.
9. However, the Judge correctly directed himself that the burden was on the appellant to show that he had a retained right of residence, and in paragraph [11] of his decision he gave adequate and sustainable reasons as to why he considered the documentary evidence of the sponsor's activities as a self-employed person from 2009 to the point of divorce to be "*scant*" and not sufficient to show on the balance of probabilities that, "*the sponsor was in the United Kingdom exercising Treaty rights at the point of divorce*".
10. Accordingly, the errors made by the Judge were not material to the outcome. The Judge did not err in finding that the appellant had not discharged the burden of proving that he had a retained right of residence.

Notice of Decision

The decision of the First-tier Tribunal did not contain a material error of law, and so the decision stands.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson