Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/14215/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2017	**On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ALAIN TANKE TSAYEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Otchie of Counsel instructed by JBP Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge McGavin promulgated on 3 April 2017 in which she dismissed the Appellant's appeal without a hearing against a decision of the Respondent dated 2 December 2016 refusing a EEA permanent residence card or a residence card based on the Appellant's claim to have a retained right of residence following separation and divorce from his spouse.

2. The Appellant is a citizen of Cameroon born on 24 May 1981. He married Ms Valerie Judith Diane Veilleur, a French national born on 23 May 1990,

on 20 June 2011. Pursuant to that relationship he was issued with an EEA residence card on 16 September 2011. The relationship between the Appellant and his wife broke down in or around July 2014 and in due course they were divorced - the Decree Absolute being dated 10 March 2016. The Appellant applied for a permanent residence card on the basis of a retained right of residence, but this application was refused by the Respondent pursuant to regulations 10(5) and (15)(1)(f) of the Immigration (European Economic Area) Regulations 2006.

3. The Appellant appealed to the First-tier Tribunal. In his Notice of Appeal he indicated that he wanted his appeal decided without a hearing 'on the papers', and it was in such circumstances that the case came before Judge McGavin.

4. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in the Decision promulgated on 3 April 2017.

5. The Appellant applied for permission to appeal. Permission to appeal was granted by Deputy Upper Tribunal Judge Chapman sitting as a First-tier Tribunal Judge on 16 October 2017. The grant of permission to appeal does not reflect the basis of the grounds submitted in support of the application for permission to appeal but identifies a matter not pleaded. Judge Chapman referenced the Respondent's policy in respect of EEA applicants who had difficulties in obtaining supporting documents from former partners or spouses. In material part the grant of permission is in these terms

> *"It is clear from the Home Office guidance on* 'Free movement rights: retained rights of residence' *7 February 2017, that where an applicant's relationship has ended under difficult circumstances but they have provided evidence to show that they have made every effort to provide the required documents the Respondent* 'must take a pragmatic approach and ... if you are satisfied the applicant cannot get the evidence themselves, make enquiries on their behalf where possible'. *The Judge appears to have been unaware of this guidance and the fact that it would have been open to him to direct HMRC to provide evidence of the tax and NI paid by the Appellant's former wife".*

6. The relevant policy document has been provided to me by Mr Otchie who represents the Appellant today. It is not for a moment disputed on behalf of the Secretary of State by Mr Bramble that the policy exists, or that its contents are not in part as quoted above. The document is titled 'Free movement rights: retained rights of residence' (Version 3.0) and is, as Judge Chapman identified, dated as published on 7 February 2017.

7. In a section headed 'Applicants who are unable to provide all the evidence of their EEA sponsor', amongst other things the following passage appears:

> *"Where a relationship has broken down due to domestic violence or other difficult circumstances it may not always be possible for the applicant to provide all of the necessary documents about the EEA national sponsor. In such circumstances, you can make further enquiries about the EEA national sponsor's status but only where the applicant has shown they have made every effort to provide the necessary evidence.*
>
> *Regulations 17, 18 and 19 of the 2016 regulations put the responsibility on the applicant to provide the necessary proof that they are eligible for a document to confirm their right of residence in the UK".*

8. Later, under a sub-heading of the same heading, there appears the quotation that Judge Chapman has identified in the grant of permission to appeal. In fuller context it is in the following terms.

> *"**No Evidence of EEA Sponsor***
>
> *In cases where there has been a breakdown in the relationship between the applicant and their EEA national sponsor it may not always be possible for them to get the documents that are needed to support their application.*
>
> *An example of this could be where the applicant was the victim of domestic violence and could not provide evidence relating to their EEA national sponsor's nationality or free movement rights (to ask them to do so could put them at risk). ..."*
>
> *Another example would be where the applicant's relationship has ended under difficult circumstances but they have provided evidence to show that they have made every effort to provide the required documents. Such as, attempting to make contact with the EEA national sponsor during divorce proceedings.*
>
> *When dealing with these cases you must take a pragmatic approach and:*
>
> - *consider each case on its merits*
> - *if you are satisfied the applicant cannot get the evidence themselves, make enquiries on their behalf where possible, getting agreement from your senior caseworker before doing so."*

9. In the context of the grant of permission to appeal and the facts of this particular case, the focus during the course of submissions before me has been on paragraphs 13 and 14 of the decision of Judge McGavin. Those paragraphs are in these terms:

> *"13. It is submitted for the Appellant that he was the "victim of infidelity and degrading treatment by his former wife which led to their relationship to be deteriorated beyond repair and this was one of the reasons why he could not provide all the documents to show that he qualified for permanent residence'" (skeleton argument para 3). Even so it is stated he managed to "gather from their storage copies of payslips and proof that his former wife exercised her treaty right [as a] part time worker and student during the 5 years relevant period'" (also para 3).*
>
> *"14. The witness statement which the appellant has provided does not show, nor is there other evidence (such as police reports) to show, that the appellant was the victim of degrading treatment or that he was prevented by violence or other behaviour on his wife's part from obtaining the documentation which he needed to prove his claim. There is no evidence to show that he has attempted to make any contact with his ex wife at all, with a view to obtaining the documentation necessary, or has been prevented from doing so. From what is stated in the skeleton argument, the couple had belongings stored in a storage facility to which the appellant had access and he did obtain documents which his agents consider show that his ex-wife had been exercising her treaty rights "part time" and "during the 5 years relevant period". However, what is required is evidence that she was a qualified person, not part time, but continuously up to and at the date of divorce and there is no evidence to show that she has been a qualified person for any continuous period, and not at the date of divorce."*

10. The witness statement that the Appellant had provided, referred to at the beginning of paragraph 14 of the Judge's Decision, was in fact not a witness statement from the Appellant himself. Under cover of letter dated 31 January 2017 in addition to the Skeleton Argument the Appellant's representatives submitted only one further document - being the witness statement of a Mr George Adolina. This witness statement gives evidence as to the fact of the relationship between the Appellant and his ex-wife, and also says something to confirm that the relationship broke down. Mr Adolina identifies that he remained in touch with both parties to the marriage, but characterises the relationship as being such that the Appellant and his former partner *"are not the best friends as they do no longer speak to each other"* (paragraph 9).

11. Mr Bramble argues for the Secretary of State that the Judge's considerations at paragraph 14 in respect of the absence of any evidence that the Appellant "*has attempted to make any contact with his ex wife at all*" in respect of documentation demonstrates that it is more likely than not that the First-tier Tribunal Judge *was* aware of the policy. In particular Mr Bramble identifies that the references to "*degrading treatment or… violence or other behaviour on his wife's part*" clearly echo some of the wording in the policy document. Further, it is submitted that the scheme of the Judge's fact-finding is almost congruent with the requirements of the policy document. Even if it were otherwise, Mr Bramble argues, that the Judge has in substance made findings which indicate that the 'trigger' within the policy document for the Respondent contacting the HMRC is quite simply not made out on the evidence that was before the First-tier Tribunal Judge.

12. In contrast, Mr Otchie urges me to consider that the fact that the relationship had broken down in circumstances of the ex-partner's infidelity, together with the supporting evidence of the witness to the effect that the couple no longer spoke, was such as to indicate that the Appellant need not be required to make any more effort to obtain documents than he did - which in substance was essentially to go through the materials to which he had access to in the couple's storage facility.

13. In my judgment it is abundantly clear that the materials before the First-tier Tribunal Judge supported the findings at paragraph 14 of her Decision. Indeed, I do not understand in terms that it is suggested that the Judge fell into material error of law with regard to those findings of fact, or that it is argued that the Judge in any way misunderstood the evidence. I do not accept the submission that the evidence of Mr Adolina was sufficient to demonstrate that the Appellant need not make any more effort to provide documentation and was entitled, in effect, to allow the agencies of the state to do his work for him. In this context I remind myself that the policy emphasises that in the ordinary course of events the responsibility on providing necessary proof rests with the applicant. Moreover it seems to me that in circumstances where there is absolutely no evidence that the Appellant took any steps to contact his former partner in relation to obtaining documentation - not even through the offices of their mutual friend - it cannot be said that the policy is engaged.

14. In all such circumstances I do not accept that there was any error, far less material error, on the part of the First-tier Tribunal Judge in failing to direct that the HMRC should be required to provide documents in relation to the partner's financial circumstances.

15. One further matter has been emphasised during the course of submissions, rooted in paragraph 5 of the grounds in support of the application for permission to appeal. There were documents filed in

support of the Appellant's application indicating that his ex-partner had been a student at the London Guildhall College on courses from September 2014 to July 2015 and September 2015 to July 2016. It is argued that the First-tier Tribunal Judge appears to have overlooked this evidence. I acknowledge that there is no finding in respect of these documents, and it may well be that in the circumstances the Judge was in factual error to suggest that there was no evidence that the partner had been a 'qualified person' at the date of divorce - which being 10 March 2016 would have fallen within the period of the academic year 2015/2016. However it seems to me that that is not sufficient to avail the Appellant in the proceedings before me. Study at these times does not fill all of the relevant gaps in the evidence in respect of the Appellant's ex-partner's exercise of Treaty rights. Moreover, as the Respondent identifies in the Rule 24 response, there was additionally a lack of any supporting evidence as to the presence of comprehensive sickness insurance during such periods. In those circumstances I am not persuaded that any oversight in respect of the documents relating to study amount to a material error on the part of the Judge.

16. The Appellant is perhaps not without remedy because it is always open to him to reapply for a permanent residence card on the basis of retained right of residence. In this context whilst I note that Judge Chapman expressed the tentative view that perhaps First-tier Tribunal Judge McGavin was unaware of the policy, it seems to me abundantly clear that the Appellant and his then advisors were unaware of the policy. There is absolutely nothing in the materials presented to the Respondent in the course of the application to indicate that he was aware that any possible difficulties he might claim to be experiencing could be remedied with the assistance of the Respondent. Nor was any reference to the policy made in the grounds to the First-tier Tribunal, or in any of the materials before the First-tier Tribunal - including the Skeleton Argument. Yet further, no reference to the policy was made in the application for permission to appeal to the Upper Tribunal. It was only upon Judge Chapman's involvement that the policy became a matter relied upon by the Appellant at all. Moreover, there is substance to Mr Bramble's submission that the Judge appears to have been alert to the terms of the policy even if she did not expressly identify the policy in her Decision. Be that as it may, on its face it seems to me more likely than not that the Appellant and his advisors were unaware of the policy, and necessarily therefore did not consider preparing and presenting the application and appeal with reference to the requirements of the policy. The Appellant now is aware of the policy. It is a matter for him and his advisors as to what he might wish to do with that knowledge going forwards and I say no further on it.

Notice of Decision

17. The decision of the First-tier Tribunal contained no material errors of law and accordingly stands.

18. The Appellant's appeal remains dismissed.

19. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **26 January 2018**

Deputy Upper Tribunal Judge I A Lewis