Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07591/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 May 2019	**On 23 July 2019**
Extempore judgment	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ISAAC NSAH DOBILAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant did not appear before me today. He was given notice of the hearing in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules"). As far as I am aware, the appellant has not contacted the Tribunal to say that for some reason he was unable to attend. There is nothing to suggest that he has sought an adjournment. I therefore decided to proceed in his absence pursuant to rule 38 and the overriding objective in rule 2 of the Procedure Rules.

The appellant is a citizen of Cameroon born in 1973. He appealed to the First-tier Tribunal ("FtT") against a decision made on 30 October 2018 to refuse a residence card on the basis of a retained right of residence.

His appeal came before First-tier Tribunal Judge Young-Harry (The FtJ") who dismissed the appeal. She concluded that in order to acquire a retained right of residence in the UK the appellant must show that he had resided in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") for a continuous period of five years and that at the end of that period he had a retained right of residence. Further, that he must show that his ex-wife, the relevant EEA national, was exercising Treaty rights at the initiation of divorce proceedings.

The FtJ referred to the fact that this was the appellant's third application of this nature. She had regard to the decision in *Devaseelan* [2002] UKIAT 00702 in view of the fact that there was an earlier appeal in October 2017 which was dismissed because the appellant had failed to show that the EEA national was exercising Treaty rights at the date of the decree absolute and because there were significant gaps in the appellant's employment history.

The FtJ in this case noted that the appellant and his ex-wife got married on 27 November 2010 and that they have three children together. Their divorce was made absolute on 29 December 2014. Considering reg 10(5) of the EEA Regulations she accepted that the marriage had lasted for three years and that they had lived in the UK for at least a period of one year.

However, she concluded that the appellant had not satisfied other necessary requirements of the EEA Regulations. She noted that the appellant was granted a residence card valid between 30 July 2010 and 30 July 2015 and that he claimed he was unable to work due to illness, yet claiming to have retained his status as a jobseeker. She referred to the appellant having provided wage slips that covered two months in 2012, one month in 2013, two months in 2017, seven months in 2018 and two months in 2019. In the light of that evidence she concluded that the appellant had failed to provide sufficient evidence to show that he had worked for a continuous five-year period. Nor had he shown that he had retained his worker status as a jobseeker when he was not in employment.

She went on to find that, in line with the findings of the FtT in October 2017, the appellant had failed to provide any evidence to show that his EEA national ex-wife was exercising Treaty rights on the initiation of, or the completion of, the divorce proceedings. She disagreed with the appellant's contention that his former spouse's permanent residence status precluded her from the need to establish that last requirement.

In the grounds of appeal, the appellant, who was unrepresented before the FtT and is unrepresented again before the Upper Tribunal, makes the assertion that the FtJ failed to take into account his mental health conditions and the recession which prevailed at that time, making the job market difficult. It is also contended that she misinterpreted the evidence and 'exaggerated' the

reasons for dismissing the appeal. It is argued that his ex-spouse had exercised Treaty rights for five years.

In her submissions, Ms Jones resisted the grounds, suggesting that even if there was an error in the FtJ's assessment of the appellant's employment, any such error was not material because, put simply, the appellant had not established that his ex-spouse was exercising Treaty rights at the date of divorce.

Assessment

The FtJ referred to the appellant's claim that he was unable to work due to illness. However, it appears that the only evidence of any illness in the documents before the FtJ was firstly a Statement of Fitness for Work for the purpose of Social Security and Statutory Sick Pay dated 8 September 2014 stating that the appellant was unfit for work for a period of 30 days because of depression. Secondly, there was the first page of a two page letter from the Charter House "Assessment & Single Point of Access" service in Luton dated 2 September 2014 which refers to a diagnosis (unspecified) that the appellant wanted changed and to the appellant having suffered from depression in the past although he refused to give details. No diagnosis is apparent from that part of the letter that has been provided.

Therefore, even if it could be said that the FtJ failed to make an assessment of the issue of his health in terms of whether the appellant was exercising Treaty rights, there was in fact little evidence before the judge to assess in that respect. Furthermore, I am satisfied that the FtJ did properly appraise the evidence in terms of the appellant's employment and she was entitled to conclude that he had not provided sufficient evidence to show that he had worked for a continuous five-year period.

Similarly, and significantly, the appellant failed to establish that his ex-wife was exercising Treaty rights at the time of the divorce. That was a finding that was made at the appeal in October 2017. The FtJ in the instant appeal quite properly had regard to the findings in that earlier appeal and used them as her starting point.

The FtJ rightly rejected the contention that his former spouse's permanent residence status obviated the need for the appellant to establish that she was exercising Treaty rights at the date of the divorce. The mere fact that she had permanent residence status does not mean that she was exercising Treaty rights at the date of divorce. That issue needed to have been looked at as at the date of the hearing before the FtT.

In all those circumstances, I am not satisfied that there is any error of law in the FtJ's decision. Her decision to dismiss the appeal must therefore stand.

Upper Tribunal Judge Kopieczek 22/07/19