Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/10842/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2019	**On 27 March 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

VICTOR SOJI SURULERE FLOMO
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Karim S Karim, instructed by Chris Alexander Solicitors
For the respondent: Mr David Clarke, 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 respondent's decision on 26 March 2016 to refuse to issue him a permanent residence card under Regulation 15 with reference to Regulation 10 (5) and 10(6) of Immigration (European Economic Area) Regulations 2006 based on retained rights as the former spouse of an EEA citizen. The sponsor, from whom the appellant is now divorced, is an Austrian citizen.

Background

2. The appellant is a citizen of Nigeria, born in Lagos in 1988, who claims to have arrived in the United Kingdom in 2006 (he does not say on what basis) and remained here since then. In 2008, he met his former wife in London; by 2009 they were cohabiting and had decided to marry, and on 5 June 2010, they married at Waltham Forest Registry Office.

3. The appellant's evidence was that from 1 May 1999 until 30 August 2012, the sponsor was a student. No corroborative evidence of the sponsor's study is produced. On 22 July 2011, the appellant applied for a residence card, which was issued 11 October 2011, and would have expired on 11 October 2016 if the marriage had not failed. From 2013 onwards, the appellant was registered for employment with the Delta Nursing Agency. He worked when called upon to do so, but his employment was not continuous, consisting as it did of agency placements.

4. The sponsor began to work and therefore to exercise Treaty rights on 18 April 2011. Her exercise of Treaty rights from 18 April 2011 through to at least November 2015 is not disputed by the respondent. The 5-year period for which the appellant needs to show that he was exercising Treaty rights runs from 18 April 2011 to 18 April 2016.

5. Meanwhile, unhappy differences had caused the appellant's marriage to fail. The parting was acrimonious, with the sponsor ejecting the appellant from the matrimonial home but refusing to give him any of his personal belongings, including important documents, such as his Nigerian passport. In September 2015, the appellant reported his missing passport to the police, who contacted his estranged wife and she said that she had posted his documents to his new address.

6. A divorce petition was issued in May 2015 (the *Baigazieva* date of termination of the marriage), and from that date on, the appellant needed to show that he was exercising Treaty rights in his own right. Delta Nursing Agency confirmed that he was on their books from 18 January 2015 to 14 October 2015.

7. There was no evidence of employment between 14 October 2015 and February 2016, when the appellant got a new job. He registered with a new agency and his first placement was on 13 February 2016, his first payslip on 24 February 2016.

8. On 11 February 2016, the appellant applied for permanent residence, asserting a retained right of residence following his divorce, pursuant to Regulation 10(5) and 10(6) of the 2006 Regulations.

Refusal letter

9. On 26 August 2016, the respondent refused to grant the appellant a permanent right of residence as requested. The respondent accepted that the requirements to reside in the United Kingdom for at least one year of

the marriage, and to have been married for more than three years, were met for both the appellant and sponsor.

10. The respondent had contacted the care home where the sponsor worked, and her employer, Asprey House Care Home, had confirmed that she was employed there from 1 April 2011 and continuing beyond the decree absolute of divorce on 9 November 2015. There was no documentary evidence of employment or exercise of Treaty rights by the sponsor before April 2011. The respondent refused the permanent residence card because he was not satisfied that since the date of commencement of divorce proceedings (May 2015) the appellant had been exercising Treaty rights continuously as a worker, as though he were an EEA national.

11. The refusal letter also dealt with Article 8 ECHR, noting that no Article 8 claim had yet been made and that it remained open to the appellant to make such a claim on the appropriate form, as a charged application. The appellant's travel document was retained and his application failed.

12. The appellant exercised his in-country right of appeal to the First-tier Tribunal.

First-tier Tribunal decision

13. The First-tier Judge set out at [18] areas of concerns regarding the copy payslips submitted evidencing the appellant's employment with Extra Pay Limited. The judge was troubled that every single weekly payslip showed a holiday advance; that there were both minor and serious arithmetical errors on at least five payslips, including as to the total net pay; and that incorrect week numbers appeared on some of them. The Judge also expressed concern regarding the sponsor's Form P60, which was a photocopy, with no witness statement evidencing how it had been obtained. Unfortunately, none of these errors were raised with the appellant or his representative at the hearing.

14. The First-tier Judge applied *Tanveer Ahmed* and concluded that the payslips and form P60 were unreliable evidence, that he was not satisfied as to the sponsor's claimed employment, and found that the requirements of Regulation 10(6) were not met. He dismissed the appeal.

Grounds of appeal

15. The appellant appealed to the Upper Tribunal arguing that the First-tier Judge erred by:

    (1) Not making any, or any adequate credibility findings regarding the appellant's oral evidence, although it was recorded in the decision;

    (2) Incorrectly identifying the 5-year period for permanent residence, which Mr Karim argued should be calculated between the date of marriage on 5 June 2010 and 5 June 2015. The decree absolute of divorce had been pronounced on 9 November 2015;

(3) Failing to have regard to the respondent's concession in the refusal letter and at the hearing, that the sponsor was exercising Treaty rights in the United Kingdom from 18 April 2011 up to and including the date of divorce (9 November 2015);

(4) Failing to draw to the appellant's attention any concerns he had about the documents produced being photocopies, nor giving him any opportunity to comment on the First-tier Judge's concerns relating to his payslips, as set out at [18] in the First-tier Tribunal decision.

16. Mr Karim contended that, applying *MM* (unfairness: E & R) Sudan [2014] UKUT 00105 (IAC) such procedural impropriety was sufficiently serious that the decision of the First-tier Tribunal must be set aside and remade.

17. In addition, the appellant produced letters from his current and previous employers which were not before the First-tier Tribunal but which he argued showed that he is and was at all material times employed and thus a qualified person under Regulations 10(5) and (6) of the 2006 Regulations.

18. Mr Karim relied on *Ladd v Marshall* and *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49, but the grounds of appeal do not explain why those decisions are relevant.

Permission to appeal

19. Permission to appeal was granted by First-tier Judge Miller on 31 January 2018. He considered it arguable that the concerns regarding the appellant's payslips should have been put to him at the hearing, and that there might be an explanation for the matters which troubled the First-tier Judge. Judge Miller also considered that it was arguably wrong for the Judge to have gone behind the Secretary of State's concession that the sponsor was exercising Treaty rights in the United Kingdom.

20. At a hearing on 7 November 2018, Mr Jarvis, the Senior Home Office Presenting Officer appearing, conceded that there had been a procedural error by the First-tier Judge in failing to put to the appellant issues concerning his payslips and/or to determine whether the appellant had accrued five years' respondent. Upper Tribunal Judge Coker set aside the decision for remaking in the Upper Tribunal.

21. On 1 February 2019, Upper Tribunal Judge O'Connor made a transfer order, deciding that it was not practicable for Upper Tribunal Judge Coker to complete the remaking of the appeal decision without undue delay. That is the basis on which this appeal came before me for remaking.

Upper Tribunal hearing

22. I take into account the brief record of the appellant's oral evidence in the First-tier Tribunal at [12]-[15]:

> "12. In his evidence before me, the appellant confirmed his personal details and the content of his statement.
>
> 13. He said the he stopped work in October 2015, because his exwife was causing him problems. "My boss told me to rest at home. After a few months, I went through the divorce. I got a job in February 2016".
>
> 14. How did he obtain his ex-wife's P60? – "After getting the refusal letter, I spoke to a friend of my ex-wife. I said I would need the P60 from her. Luckily she [the friend] spoke to [the sponsor] and got the P60. The friend could not come today".
>
> 15. In cross-examination, he said that he could not get the original document but only a photocopy. Before being employed by the Delta Nursing Agency, he was working with an energy company for 6-7 months. He is still with Acerta24 Agency, for whom he started work in February 2016."

There was no updated statement for the Upper Tribunal hearing.

23. The appellant adopted his First-tier Tribunal witness statement dated 5 December 2017. In that statement, he says he was born in Lagos Nigeria in March 1988 and is a Nigerian citizen. He arrived in the United Kingdom in 2006 and has remained here ever since. The appellant met his former wife in London in August 2008 and they became engaged to be married in 2009, after courting and cohabiting for some time. There is still no witness statement from the appellant's former wife, nor from the friend who obtained the form P60 from her.

24. The appellant gave supplementary evidence regarding the break in his employment between October 2015 and February 2016. There was no evidence from the Job Centre or any agency to indicate that during that period of almost 4 months, he was registered for employment or actively seeking work. The appellant said that he had been looking for a job but that was made more difficult as his former partner had his passport and would not return it. The appellant had reported the loss of his passport to the police.

25. He said he spent that time not resting, as in his oral evidence to the First-tier Tribunal, but training to barber hair. He was not on a barber training course or apprenticeship: he learned by shadowing a barber in the area, who was training him without payment. There was no corroboration of this alleged training from the barber with whom he said he had trained, and the appellant gave no name for the barber.

26. In cross-examination, Mr Clarke asked whether during the appellant's barber training, he had comprehensive sickness insurance or was registered as a job seeker. The appellant replied in the negative to both questions.

27. The appellant explained that he had stopped working at the Delta Nursing Agency because of the difficulty he was having with his then wife, the EEA sponsor. He worked in a hospital, looking after patients, but he had such

problems at home with the sponsor that he could not continue with that work and had to leave, even though the appellant and the sponsor did not work at the same hospital.

28. The agency he was registered with said that they needed to see the appellant's passport, but it was missing. Later, his former spouse admitted she had taken it and the police gave the appellant a letter which he could use instead of his passport.

29. The appellant asserted that he could not get a replacement passport from the Nigerian Embassy without being lawfully in the United Kingdom with a visa. There was no evidence from the Embassy to say that travel documents were only issued to Nigerian citizens who could show that they were lawfully in the United Kingdom.

30. In answer to questions from me, the appellant said that his wife took his passport in early January or in February 2014 but the problems its absence caused went on through to 2015. He never recovered it: he reported its absence to the police on the 4 September 2014, but found out what had happened in June or July 2015 when his former wife admitted taking it, in her divorce statement.

31. During 2014, the appellant had worked on some training placements in care homes, for which he got certificates (not produced) and he thought he had some bank statements from May 2015 at home which he had not yet produced. It was not possible to go straight into working in a care home: you had to do training shifts and have immunisations. He was not able to begin work until 2015, mainly because he could not get most of his documents, which were with his former wife, who continued to give him problems even after the marriage ended. He had to change his telephone number and was prevented from working, partly by the documentary difficulties and partly by being distracted by his domestic problems.

32. There was no re-examination.

Appellant's submissions

33. For the appellant, Mr Karim acknowledged that there were insufficient payslips and that there was a gap in the appellant's employment between October 2015 and February 2016. The evidence about the appellant's Delta Nursing work was that he had only worked when called upon but was available for work, and therefore 'a worker' from February 2014 continuously until October 2015. The appellant had given candid evidence which should be treated as credible.

34. If the appellant had not made out his case on permanent residence, Mr Karim argued that he should be allowed to vary his application to Article 8 ECHR, which was not, in context, a 'new matter' requiring the consent of the respondent.

Respondent's submissions

35. For the respondent, Mr Clarke observed that the appellant's application had been for a permanent residence card based on a retained right of residence as set out in Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006. Article 8 ECHR was not engaged: the respondent had not served a section 120 notice and the application and decision letter both related to permanent residence. The grounds of appeal also related only to the EEA Regulations and the respondent would not give his consent to the variation of the appeal grounds at this late stage. It remained open to the appellant to make a paid Article 8 ECHR claim if he were so advised.

36. The appellant's explanation for his not working between October 2015 and February 2016 was unsatisfactory. He was not, therefore, able to show that he had been exercising Treaty rights continuously since the beginning of the divorce proceedings in May 2015. The appellant could have obtained evidence from either his former employers or HMRC if it existed. The appellant could not show that he was analogous to a worker in that period and therefore could not meet the requirements for permanent residence and the appeal should be dismissed.

37. I reserved my decision, which I now give.

EEA Regulations 2006

38. The appellant is seeking a permanent right of residence under Article 15(1)(f) of the 2006 Regulations:

> "15. - (1) The following persons shall acquire the right to reside in the United Kingdom permanently— …
>
> (f) a person who—
>
> (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
>
> (ii) was, at the end of that period, a family member who has retained the right of residence."

39. On the evidence before me, I find that the appellant has not discharged the burden of showing, to the ordinary civil standard of balance of probabilities, that he resided in the United Kingdom in accordance with the Regulations for any relevant 5-year period. Although he married his wife in 2010, she did not begin to work until 18 April 2011. The respondent accepted in the refusal letter that the sponsor was a qualified person from 18 April 2011 and that she remained so until at least 9 November 2015, when the decree absolute of divorce was pronounced.

40. I apply the guidance given at [3] in the judgment of Lord Justice Singh in *Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088,* that this appellant cannot rely on the sponsor's status as a qualified person after the divorce proceedings were issued in May 2015.

41. Thereafter, he must prove that he is a family member who has retained the right of residence, for the rest of the period of 5 years (so until April 2016) and remained so at that date.

42. The EEA Regulations 2006 at Regulation 10(5) and 10(6) set out what is required in order for a non-EEA citizen to retain the right of residence following divorce, as follows:

> "10. (1) In these Regulations, "family member who has retained the right of residence" means, … a person who satisfies the conditions in paragraph (2), (3), (4) or (5). …
>
> (5) A person satisfies the conditions in this paragraph if—
>
> (a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;
>
> (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
>
> (c) he satisfies the condition in paragraph (6); and
>
> (d) …
>
> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration; …
>
> (6) The condition in this paragraph is that the person—
>
> is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; …."

43. There is no difficulty about the conditions in Regulations 10(5)(a), 10(5)(b), or 10 (5)(d). The issue in this appeal is confined to the operation of Regulations 10(5)(c)(i) and 10(6). I note that although Regulation 4 of the 2006 Regulations defines 'worker' as a worker within the meaning of Article 39 of the Treaty establishing the European Community, and also provides definitions of self-employed person, self-sufficient person, and 'student', sub-paragraph 10(6) applies only to workers, self-employed persons and self-sufficient persons, with no mention of 'students'. I therefore spend no time on the claimed barber training, which cannot assist this appellant in showing that he meets Regulation 10(6).

44. I have considered whether the appellant can show that he was a qualified person (in context, a worker as defined by the Regulations) from May 2015, when the divorce proceedings began, until 18 April 2016, the fifth anniversary of the date when the sponsor began to work and from which she is accepted to have been a qualified person. I do not propose to investigate the validity or reliability of the payslips in evidence before the Upper Tribunal today.

45. Taken on its face value, the evidence of the Delta Nursing payslips is that the applicant worked 5 shifts in week commencing 19 June 2015, 3 shifts in week commencing 26 June 2015, 3 shifts on 17 July 2015, after which there is a 6-week gap. The appellant's evidence was that he did not register with the Job Centre when not working.

46. Absent evidence to the contrary, I approach this appeal on the basis that there was a first gap in employment between 15 June 2015 and the beginning of September 2015. The copy payslips then indicate that the appellant resumed work in September 2014, working one shift in week commencing 4 September 2015, four shifts in week commencing 14 September 2015, two shifts in week commencing 25 September 2015, three in week commencing 2 October 2015 and one shift each in week commencing 16 and 23 October 2015.

47. There is no payslip evidence after that, and the appellant's oral evidence is consistent in his witness statement and his oral evidence before the First-tier Tribunal and the Upper Tribunal. He says that (apart from his barbering) he did not work from October 2015 until February 2016.

48. This appellant cannot, therefore, discharge the burden on him of showing that it is more likely than not that he completed a 5-year period for a permanent right of residence by working in his own right between May 2015 and 18 April 2018, nor that he was in employment at the end of that period. On the contrary, I find that the appellant was not in the United Kingdom in accordance with the Regulations in the latter half of June 2015, all of August 2015, November and December 2015 and January 2015.

49. The appellant cannot, therefore, show that he has lived in the United Kingdom for 5 years 'in accordance with the Regulations' and he is not entitled to a residence card evidencing a permanent right of residence.

50. If the appellant has an Article 8 ECHR claim, it is open to him to make a paid human rights application, but the present appeal cannot succeed and is dismissed.

DECISION

51. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    I set aside the previous decision. I remake the decision by dismissing the appeal. .

Date: 22 March 2019 Signed Judith AJC Gleeson

Upper Tribunal Judge Gleeson