Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/31517/2015
HU/03892/2016

THE IMMIGRATION ACTS

Heard at Field House
On 28 June 2017

Decision & Reasons Promulgated
On 3 July 2017

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAYODE SHAFI AMUNI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Singh, Senior Home Office Presenting Officer
For the Respondent: Mr Ogunbiyi, Counsel, instructed by Spring Solicitors

DECISION AND REASONS

1. This an appeal against the decision promulgated on 14 November 2016 of First-tier Tribunal Judge M R Oliver. The decision considered the appellant's claim that he was entitled to settlement on the basis of ten years' lawful continuous long residence

© CROWN COPYRIGHT 2017

and that he was entitled to permanent residence as the former spouse of an EEA national with retained rights of residence.

2. In order to consider the error of law decision here it is necessary to set out the appellant's immigration history in a little detail. The appellant came to the UK from Nigeria with entry clearance as a student on 16 August 2005. He was granted leave to enter until 31 October 2006. He obtained further leave as a student until 31 October 2007. He then obtained a further grant of leave until 31 July 2008.

3. On 21 July 2008 the appellant applied for leave to remain as a student. The application was rejected on 29 July 2008 because the fee was not correctly paid.

4. On 2 August 2008 the appellant applied again for further leave to remain as a student. That application was rejected on 15 September 2008 as a mandatory section of the application form was not completed.

5. On 20 September 2008 the appellant applied again for further leave to remain as a student. That application was rejected on 25 November 2008 as it was made on an out of date application form.

6. On 3 December 2012 the appellant applied for further leave to remain as a student. This application was accepted as valid and he was granted leave to remain on 24 March 2009 until 31 December 2009.

7. On 21 May 2009 the appellant applied for a Certificate of Approval to marry an EEA national. That Certificate was issued to him on 6 July 2009. He then married [MS] on 7 September 2009. It is not disputed that [MS] is a national of France.

8. On 18 December 2009 the appellant applied for a residence permit as the spouse of an EEA national exercising treaty rights. On 6 June 2010 the Secretary of State refused that application. The appellant was successful on appeal however and on 5 November 2010 he was issued with a residence card showing his status as the spouse of an EEA national exercising treaty rights until 5 November 2015.

9. On 15 December 2014 the appellant and [MS] divorced. On 16 December 2014 the appellant applied for a residence card showing that he had permanent residence, claiming that he had a retained right of residence after the termination of the marriage. On 7 September 2015 the respondent refused that application maintaining that there was no evidence that the spouse was working as of the date of divorce.

10. On 27 October 2015 the appellant made a further application, this time for settlement based on long residence. That application was refused on 27 January 2016 as it was found that the period in 2008 during which he made the multiple applications for further leave which were rejected as invalid meant that he did not have ten years' continuous leave. Further, the period in the UK as the spouse of an EEA national did not amount to leave for the purposes of the long residence Immigration Rules.

11. Both appeals came before First-tier Tribunal Judge Oliver on 13 October 2016. At [14] Judge Oliver found that the applicant had shown books of invoices for his wife's earnings from June 2010 to September 2013. He goes on to state as follows in [15]

> "It follows from the evidence that at the date of his divorce, 15 December 2014, the appellant had resided in the United Kingdom for a continuous period of five years. I am satisfied that he had resided in accordance with the Regulations during that period because, although they had not been residing together since "some time in 2013", it is the date of divorce that counts in EEA law and he has, albeit late, shown, by her earlier wage slips and subsequent invoices, that she was a qualified worker throughout the five-year period. The marriage had lasted for at least three years and they had lived together in the United Kingdom for at least one year. The appellant is entitled to permanent residence under the EEA Regulations. "

12. Judge Oliver also made a decision on the long residence application in [16]:

> "16. In respect of the appellant's application under long-term non-EEA residence the respondent has relied upon the breaks in his leave when applying for extension of his student leave. I note that in the refusal the respondent accepts that these were 'rejected' and does not use the word 'refused'. I accept the distinction which was argued at the hearing. Although the whole process took some considerable time, most of this passage of time occurred because of the time it took the respondent to deal with each of the three submissions. It seems that the respondent may also have accepted the difference between 'rejected' and 'refused', because when the final objection was met the appellant was granted leave. It follows that I find the periods between the first rejection and the subsequent grant of further leave were covered by Section 3C leave under the *Immigration Act 1971*.
>
> 17. That helps the appellant only to an extent, however, since the time spent in the United Kingdom under the EEA Regulations is a right to reside and not the same as leave to enter. By itself it cannot count in the computation of time. As a matter of law, therefore, the appeal must fail.
>
> 18. That, however, is not an end of the matter, since the respondent's guidance states that in precisely these circumstances the exercise of discretion is to be undertaken. Since this exercise has not hitherto been undertaken, therefore, I refuse this application under the Rules but remit the decision for further consideration by the respondent."

13. Having made those findings on the EEA application and the long residence application, apparently satisfied with the evidence on the former but not the latter, Judge Oliver goes on to say this under the heading "Notice of Decision":

> "The appeal under the Rules is allowed.
>
> The appeal under the Immigration (European Economic Area) Regulations 2006 is refused but the decision is remitted for further consideration."

14. Two material errors of law are alleged by the respondent and I find both are made out.

15. Firstly, the substantive contents of [15] to [18] make it clear that the First-tier Tribunal Judge did not find that the application under the Immigration Rules could be allowed. The appellant cannot show 10 years' continuous lawful residence. The immigration history set out above shows that he had no leave from 29 July 2008 until 24 March 2009. He did not have Section 3C leave during that time.

16. Mr Ogunbiyi sensibly conceded this error of law, that this part of the appeal had to be re-made and also that in the re-making the long residence application had to fail.

17. The second error of law is in the finding of fact and conclusion of the EEA retained right of residence decision. The test the applicant had to meet here included establishing that his former spouse was exercising Treaty rights at the date of the divorce. That is the clear meaning of Regulation 10 (5) (a) of the EEA Regulations which requires that the person "ceased to be a family member of a qualified person *on the termination of the marriage* (my italics)."

18. It is undisputed that the evidence before Judge Oliver showed only that the spouse had been working up until September 2013. It did not show her exercising Treaty rights thereafter and not as of the divorce on 15 December 2014.

19. In addition, the final wording of the decision goes on to refuse the EEA appeal but also states that it was "remitted for further consideration". Following the changes to the statutory appeal regime in the Immigration Act 2014, there is no jurisdiction for an Immigration Judge to find that a decision is not in accordance with the law and remit a case to the respondent.

20. These matters amounted to a further error on a point of law which required the EEA decision to be set aside and remade.

21. I proceeded to hear evidence from Mr Amuni. He explained the steps he had taken to try to get evidence to show his ex-wife continued to exercise Treaty rights up until the time of the divorce. He stated that she refused to answer his telephone calls after she left their home. Her number eventually did not respond at all. He approached a friend of hers who told him that she did not know where his wife was. He rang her brother in France who told him he did not know where [MS] was either. The appellant stated that he was on good terms with the brother so did not think he would lie to him about this. He had contacted the accountants who had assisted with evidence in support of the earlier EEA residence card. They stated only that the company she ran was closed down in 2011; see [54] of the bundle.

22. It was argued for the appellant that he had taken all reasonable steps to find out what he could and in those circumstances, following her own guidance, the respondent was under an obligation to make enquiries of her own. He relied in particular on page 20 of the respondent's guidance dated 7 February 2017. That page is headed "Applicants who are unable to provide all the evidence of their EEA Sponsor". It states:

"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.

…

Another example would be 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."

23. I did not find that the evidence before me showed that the appellant had made "every effort to provide the required documents". I accept that he contacted the accountants who had prepared his ex-wife's business accounts. That is not sufficient to show that "every effort" was made. The appellant made no mention in his witness statement dated 22 March 2015 of making any attempts to contact his ex-wife. He made no reference to it in his statement dated 12 September 2016. He made no reference to the very specific evidence he gave at the hearing about contacting her friend and her brother. I found the omission of this evidence from the statement to undermine the appellant's credibility. The bundle of materials shows at [12]-[15] that he was receiving legal advice at that time so could be expected to be aware of the need to evidence his attempts to contact his wife.

24. I also did not find it credible that where the couple had been married from 2009 to 2013 that there were only two people known to him who might know where his wife could be or assist him to contact her.

25. Where the appellant has not shown that he had made "every effort to provide the required documents" the respondent's guidance on making enquiries on his behalf does not come into play.

26. I did not find that the appellant had shown that as of the date of the divorce his wife was exercising Treaty rights. Regulation 10 (5) of the EEA Regulations is not met. The appeal against refusal of an EEA residence card showing retained rights of residence is refused.

Notice of Decision

27. The decision of the First-tier Tribunal discloses an error on a point of law in both appeals and is set aside.

28. The appeal under the Immigration Rules on long residence grounds is refused.

29. The appeal under the EEA Regulations against refusal of a residence card showing retained rights of residence is refused.

Signed Date 30 June 2017

Upper Tribunal Judge Pitt