



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02132/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10th April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR AUGUSTINE ONYEKWELU OKEKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chigbol (Legal Representative)
For the Respondent: Mr I Jarvis, (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge T Jones, promulgated on 23rd August 2017, following a hearing at Taylor House on 27th July 2017. In the determination, the judge dismissed the appeal of the Appellant,

whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 8th November 1984. He appealed against the decision of the Respondent dated 24th February 2016 refusing his application for a permanent residence card.
3. The basis of the Appellant's application is that he had applied for a permanent residence card on the basis of retaining his rights following his divorce from an EEA national, namely, a Miss J.F. Fandino Medina, a citizen of the Netherlands, as confirmation of his right to reside permanently in the UK.

The Judge's Findings

4. It was observed by the judge at the outset, that the Appellant's case was that, on the basis of his witness statement, dated 27th July 2017, that he honestly believed that he met the requirements of Regulation 15, by way of documentary evidence, "like P60s to show that my spouse was a qualified person for five years up to and including the date of my application on 15th September 2015" (paragraph 9). The judge then considered the fact that the parties were no longer together. He observed that it was acknowledged that there was no divorce certificate in terms of a decree absolute at the date of the hearing. However, given that they were no longer together, this explained why there was no witness statement from Ms Medina, the spouse of the Appellant to confirm any of the details asserted by the Appellant.
5. The judge went on, in what was a short determination, to conclude that the Respondent had not conceded the matter given that there was no decree absolute, as required by Regulation 10(5)(a). The judge also said that the evidence "which was frankly quite unclear from the Appellant as to when they had separated, when they might have sought to reconcile, and no evidence whatsoever as to how and in what circumstances" was such that the P60s could not be relied upon. It was expressly noted by the Judge that the P60s concerning Ms Medina went up to 5th April 2016. However, he declared that "there is no claim that he is in a subsisting relationship" presently and the Respondent had "pointed out there was a paucity of information and evidence before the Respondent to consider the Appellant's application with reference to Regulation 10(6) and 15(1)(f)".
6. The Appellant, it was acknowledged by the Judge, had produced information and evidence regarding sources of income from him from December 2010 through to November 2015. However, the judge was unable to find for the Appellant concerning the requirements that the marriage had lasted for three years or evidence to support his claim that he had resided in the United Kingdom for at least one year with the EEA national as his spouse. The decree nisi was dated December 2013 and, in the words of the Judge, "doubtless there were difficulties with the marriage before then". He also stated that "whilst I am satisfied he has been economically active as if he were to have been an EEA national, for these reasons, given the paucity of information before me

and lack of clarify I might say within the context of the witness statement” that “I am unable to find for him” (paragraph 13).

7. The appeal was dismissed.

Grounds of Application

8. The Grounds of Appeal stated that the application was refused on 24th May 2016 on the basis that the Secretary of State was of the view that “the Appellant had failed to provide a divorce certificate or evidence that his wife was exercising treaty rights at the time of the divorce” (paragraph 3). However, the grounds argue that the Appellant was referring to the legal framework as set up in Regulation 15(1)(b) which is to the effect that the Appellant is entitled to permanent residence on the basis of being able to show that he has lived with his wife for five years who has been a worker in accordance with the Regulations.
9. The grounds assert that it is settled law that the benefits of the right of residence in the EEA for the spouse of an EEA national lasts until the marriage is formally lawfully dissolved and is not dependent upon residence together in the same domicile. Attention was drawn to the case of **Ahmed (Amos; Zambrano; Regulation 15(a)(iii)(c) [2006] EEA Regs) [2013] UKUT 00089**. It is said that this makes clear that:
 - “59. ... Our start point must be the ruling of the Court of Justice in Diatta v Land Berlin case 6-267/83 (985) (EUECJR) in which the court has continued to endorse in subsequent case law. This case establishes that a spouse continues to enjoy an EU right of residence as the family member of a Union citizen notwithstanding the fact that the couple may be living apart for their relationship.”
10. The grounds state that the fact that the Appellant’s marriage is not dissolved is irrelevant to the application of EEA law because in EEA law the Appellant continued to benefit from the legal relationship. If the Appellant’s wife had obtained entitlement of permanent residence in the UK after five years as a qualifying person, at the latest by 2014, or at the date of the hearing in 2015, then the Appellant would have obtained it as well after five years of marriage to her from 2008 to 2014. His wife’s absence at the hearing at that point would have no effect on his entitlement, because they were still married and permanent residence, once acquired, requires a two year absence to break.
11. On 1st February 2018 permission to appeal was granted on the basis that given that the judge had found that the spouse of the Appellant was not divorced from him, he could have succeeded on the basis of retained right. The judge failed to consider whether the Appellant was entitled to a permanent residence card as a family member of an EEA national. It was accepted that “the judge was presented with a confusing picture by the Appellant’s representative (at paragraph 3).
12. Nevertheless, the representative did submit that the Appellant would be entitled to a residence card on the basis that the couple had been married for five years at the date of the application.

Submissions

13. At the hearing before me on 10th April 2018, Mr Jarvis, appearing on behalf of the Respondent Secretary of State, made it clear that whereas it was the case that the judge had failed to make any reference to Diatta v Land Berlin (Case 267/83) [1985] ECR 567. It was also the case that he had failed to draw upon the jurisprudence arising from that case. Nevertheless, the fact was that the judge had asked himself the question as to whether, on the basis of the P60s for the five year period from 2011 to 2016 (which appear at page 9 of the Appellant's bundle), this evidence could be deemed to be authentic and reliable. The judge had taken the view that it was not reliable given the confusing picture that had been painted by the Appellant and his representative. Therefore, there may not have been an error of law. However, Mr Jarvis accepted that there was a reference to this evidence in the Appellant's bundle and it was also something that was expressly referred to at paragraph 16 of the Appellant's Grounds of Appeal, where attention was drawn to the P60s for the five year period from April 2009 to April 2014.
14. For his part, Mr Chigbol submitted that the starting point of the appeal before Judge Jones was precisely that the Appellant and his Dutch wife, although now separated, were not divorced, and there had not been a period of separation of two years, such that he could lose his accrued rights to permanent residence on the basis of living with a spouse who had been exercising treaty rights for a five year period from 2011 to 2016. He drew my attention to the P60s in the bundle at page 9 and he referred to the fact that although the judge does refer to exactly this evidence of P60s at page 13, he then falls into error by stating in the next breath that "there is no claim that he is in a subsisting relationship" because this is irrelevant. Also irrelevant, submitted Mr Chigbol, was the reference to a "paucity of information" because this evidence was sufficient to indicate that the Appellant's wife was indeed exercising treaty rights at the material time.
15. In reply, Mr Jarvis submitted that if the Tribunal were indeed minded, to make a finding of an error of law on the basis that the judge did not give proper consideration to the rights that had accrued to the Appellant given the jurisprudence established by data, then direction should be given so that the Respondent Secretary of State could actually verify the authenticity of the five P60s from 2011 to 2016. This was important given that the evidence from the Appellant had been that the marriage had begun to unravel and was in the process of coming to an end. He accepted that the process was a prolonged one, during which time there had been attempts at reconciliation. It did nevertheless, raise a question mark as to how the Appellant came into possession of P60s for such a lengthy period of time.
16. In that event, it was important that Mr Jarvis be able to check with the HMRC the authenticity of the particular P60s at page 9 from 2011 to 2016 for Fandino Medina. He asked for a period of 40 days to enable him to do so. Mr Jarvis submitted that if this documentation was indeed then such as could be categorised as being genuine, then it may well be that the decision letter could be withdrawn. If on the other hand this was

not the case, then the decision would hold and the Tribunal could reconsider the matter again after this appeal is remitted back to the First-tier Tribunal.

Error of Law

17. I am satisfied that the making of the decision by Judge Jones involved the making of an error on a point of law (See Section 12(1) of TCA 2007) such that it falls to be set aside. My reasons are as follows. The claim before Judge Jones, as was the claim before the Secretary of State, fundamentally relied upon the fact that the Appellant stood to benefit from permanent rights accrued on account of his having lived with a EU worker, namely, J.F.Fandino Medina, a Dutch national, who had been working in the UK for a period of five years, on the basis of P60s that were produced in the Appellant's bundle (at page 9).
18. That this is the case, is clear from the way in which the judge at the outset, and under the heading "The Appellant's Case" states, (at paragraph 9) that the Appellant "honestly believes he meets the requirements of Regulation 15" and that he did so on the basis that he had lived with a spouse who was exercising treaty rights. That being so, any discretion of the parties having separated and there being no decree absolute (as appears at paragraph 10) is otiose.
19. The reference to the decree absolute (also at paragraph 13) is only relevant in relation to Regulation 10(5)(a), as the judge himself expressly states, at paragraph 13. The essential claim really was that the Appellant had lived with an EU sponsoring wife for a period of five years and there had not been a separation between them for two years thereafter. The judge failed in terms to draw upon the case of **Diatta** in the European Court and to consider at all the fact that the Appellant was applying for a permanent residence on the basis of having lived with a wife who was exercising treaty rights. The same mistake was made by the Respondent Secretary of State. This being so, the judge fell into error.
20. It is, however, important that the P60s for the five year period having been produced, the Respondent Secretary of State is given the required period of 40 days to enquire into their genuineness and veracity, given that the evidence put forward before the Tribunal was indeed lacking in clarity. In this respect I make no criticism of the judge whatsoever. It is plain that the manner in which the appeal was being argued was unclear. I need only refer to the Grounds of Appeal before this Tribunal.
21. Whereas reference is made to the very important decision of **Diatta**, which really is the linchpin of the Appellant's claim, the recital of that case at paragraph 10 is so unclear in the language employed, which is both fragmentary and erroneous in terms of the manner that it is stated, as to be wholly misleading. Given that this was a case the judge was bound to have taken the view that matters were unclear. That said, it does not detract from the fact that **Diatta** was not applied and the essential claim raised by the Appellant, namely, that he was living with a Sponsor wife who had been exercising EU treaty rights, was not considered.

22. I give the following directions. First, that the Respondent Secretary of State be granted forty days in which to make enquiries of the HMRC as to the genuineness of the P60s that are produced from 2011 to 2016 for J.F. Fandino Medina. Second, that Mr Jarvis is to then write to the Tribunal and to the Appellant's solicitors indicating what the upshot of his enquiries are. Third, that Mr Jarvis is to also indicate whether the refusal letter stands or is withdrawn. Fourth, liberty to apply.
23. This appeal is accordingly allowed to the extent only that the decision of Judge Jones fell into error in not considering whether the Appellant was entitled to a residence card on the basis that the couple had been married for five years at the date of the application.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Jones at Taylor House at a time no earlier than June 2018.
25. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

12th May 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

12th May 2018