



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/12984/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 13 September 2018

Decision and Reasons Promulgated  
On 24 September 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

DADA EBENEZER AJAYI  
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Walsh, of Counsel, instructed by Universe Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a Nigerian national born on 12 January 1972. He challenges the determination of First-tier Tribunal Judge Shepherd, promulgated on 28 March 2018, dismissing his appeal against the respondent's refusal to grant him a permanent residence card on the basis of his former marriage to an EEA national and his retained rights of residence.

2. The appellant entered the UK as a visitor on 30 July 2008, appears to have overstayed and married a French national on 27 March 2009. On 17 January 2011 he was issued a residence card. On 22 August 2014 he and his wife were divorced. On 8 April 2016 he sought permanent residence based on his retained rights of residence. The Secretary of State considered and refused his application on 14 October 2016 on the basis that the requirements of reg. 10(5) had not been met. Whilst it was accepted that the marriage had lasted more than three years, that the couple had lived in the UK for at least one year and that the appellant had been working since the date of the divorce, it was not accepted that the appellant's former spouse had been exercising treaty rights at the relevant time because her bank statements only covered October and November 2010 and February 2011 and did not show salary payments and because all attempts to contact her employment agency failed.
3. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 12 July 2018 on the basis that the judge arguably adopted an unduly restrictive interpretation of the definition of work and erred in his approach towards the evidence obtained from HMRC. The matter then came before me on 13 September 2018.
4. **The Hearing**
5. I heard submissions from the parties with the appellant in attendance.
6. Mr Walsh submitted that the divorce proceedings commenced in February 2014. He submitted the issues were whether the appellant had a right of residence at that time and whether he retained that right on divorce. He agreed that the appellant had to show a period of five years residence under the Regulations but pointed out this could be a mixture of prior and retained rights. Mr Walsh submitted that there had been problems obtaining evidence because of the animosity of the divorce. The judge had considered the pay slips adduced which covered the period of 2010 and 2011 referred to by the respondent in the decision letter (and cited at paragraph 25 of the determination).
7. Mr Walsh turned to the evidence obtained by the Presenting Officer from HMRC. He submitted that the absence of information for 2011/2012 and 2012/2013 could possibly be due to the income being below the level required for taxation (**BUT £4,563 and 1123 below level and that was declared**) or by the employer not paying tax. He submitted that the figure of £1,123.50 with tax paid of £224.60 for 2013/2014 reflected what was declared in the P60, that there was evidence of £4,563.33 earned in 2014/2015 with tax paid of £78.60 and that she left her employment in April 2015. He agreed with the judge that the National Insurance number (NINO) did not appear on the P60, but submitted that was insignificant as the figure on the P60 accorded with what was provided by HMRC. Whilst there appeared to be two NINOs in the sponsor's name, the information from HMRC matched the P60 adduced.

8. Mr Walsh submitted that the judge was wrong to state that the appellant had to show that the sponsor had been working at all times until the divorce (at paragraph 61). It was also wrong to state that she was required to show that she had been working throughout the marriage (at paragraphs 63 and 64). The judge was also wrong to have rejected her employment because it fell below the Primary Earnings Threshold (PET). Those were all misdirections by the judge and they infected his findings. The sponsor only needed to show she was working at the time of the divorce. Proceedings commenced in February 2014 and the divorce was made absolute on 22 August 2014.
9. Mr Walsh submitted that on the basis of the sponsor's employment, the appellant had a retained right of residence. Whether that led to a permanent right of residence was a different matter, but he had established that he had retained rights. There was no definition of what genuine and effective work was and the judge had jumped from a finding that the sponsor was not earning enough to not being a worker. Reliance was placed on the decision of the European Court of Justice in Levin v Staatssecretaris Van Justitie C-53/81 [1982] 2 CMLR 454 with regards to the definition of a worker. There the court had rejected the argument that there had to be a minimum income although there was a reference to genuine and effective activities. The judge had not properly considered the sponsor's income; he should have done so and then considered whether she was a worker. He submitted that if an error were to be found, there should be a fresh hearing at which all the evidence could be re-examined.
10. In response, Mr Tufan submitted that even if the appellant succeeded in his argument that the judge had erred in law, he could still not win his appeal. He referred to OA (EEA - retained right of residence) Nigeria [2010] UKAIT 0003 and argued that the evidence did not add up to a five-year period. Reference was also made to Baigazieva regarding the commencement of divorce proceedings being the relevant date and to DV v Secretary of State for Work and Pensions (CHB): [2017] UKUT 155 (AAC) on the question of genuine and effective work. He submitted that the sponsor had only earned just over £1000 in 2013/2014. That did not amount to evidence that she was exercising treaty rights. The judge was right not to give weight to the income of £4500 because it was marginal and ancillary even if it was genuine employment. Five continuous years either before or before and after the divorce had not been made out. There were also credibility issues identified at paragraph 59 of the determination where the judge found it incredible that the appellant and sponsor would not have discussed her employment.
11. Mr Walsh responded. He submitted that the credibility issue was irrelevant given the evidence that emerged from HMRC. He submitted that the relevant period was from 2013 onwards. The PIT threshold was not contained in the Directive or the Regulations and a member state could not decide the minimum amount necessary to turn a person into a worker. The judge had not considered whether the employment was marginal notwithstanding the modest earnings.

The five-year period could start from 2013/2014 and also from 2014/2015. Since then the appellant had been working. Even if he had failed to show a completed five-year period, he was still entitled to retained rights of residence and would be able to make an application for permanent residence when he had accumulated five years. The judge’s misdirections were fatal to the decision which should be set aside.

12. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

13. **Discussion and Conclusions**

14. I have considered all the evidence before me and have had regard to the submissions made.

15. The appellant argues that he qualifies to remain on the basis of retained rights of residence and also argues that he is entitled to permanent residence; although, as I shall consider later, the second point was less forcefully made in Mr Walsh's submissions.

16. Regulation 10 deals with family members with retained rights of residence. The relevant sections provide:

*10. – (1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).*

.....

*(5) The condition in this paragraph is that the person (“A”) –*

*(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage ...of A;*

*(b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;*

*(c) satisfies the condition in paragraph (6); and*

*(d) either –*

*(i) prior to the initiation of the proceedings for the termination of the marriage ..., the marriage ... had lasted for at least three years and the parties to the marriage ... had resided in the United Kingdom for at least one year during its duration;*

.....

*(6) The condition in this paragraph is that the person –*

*(a) is not an EEA national but would, if the person were an EEA national, be a worker ... under regulation 6; .....*

.....

*(9) A family member who has retained the right of residence ceases to enjoy that status on acquiring a right of permanent residence under regulation 15.*

Regulation 15 deals with permanent residence and, in so far as it is relevant to the appellant, states:

*15. – (1) The following persons acquire the right to reside in the United Kingdom permanently –*

.....

*(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;*

.....

*(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 the period, a family member who has retained the right of residence.*

- 17. It is plain from the Regulations that the appellant cannot have both a retained right of residence and an entitlement to permanent residence as the former status lapses upon achieving the latter (reg.10(9)). However, he would need to acquire the first in order to obtain the second.
- 18. The judge is criticized for considering whether the sponsor exercised treaty rights for a five year period prior to the divorce. Whilst this would have been appropriate had he been considering reg. 15(1)(b), it is clear from his paragraph 61 that he was addressing reg. 10. Under that provision, the appellant had to show (i) that his sponsor was exercising treaty rights at the time of the commencement of the divorce proceedings, (ii) that the marriage had lasted at least three years and that the sponsor had resided in the UK for at least one year during the marriage and (iii) that the appellant had been working as if he were an EEA national since the divorce. Additionally, he had to accumulate a period of five years either before and/or after the divorce to obtain permanent residence. Whilst the respondent (and indeed the judge at paragraph 56(a))

accepted that (ii) and (iii) had been met, he did not accept that (i) had been shown and that was what the judge was required to consider before going on to consider whether the five year period was met. The judge, therefore, erred in finding that for the appellant to qualify for retained rights of residence his former spouse would have had to have been exercising treaty rights for a five-year period prior to the divorce. It remains to be seen, however, whether this is a material error.

19. There was evidence before the judge both from the appellant as well as evidence obtained from HMRC by the Presenting Officer. It is not suggested that the latter evidence is unreliable and indeed Mr Walsh relied on it in his submissions and used it to back up the P60 evidence submitted by the appellant for 2013/2014 and to counter the adverse credibility findings made by the judge at paragraph 59 (although these pertained to matters other than the earnings for that year). Although Mr Walsh submitted that the absence of any declaration of income to HMRC for 2012/2012 and 2012/2013 could have been because the sponsor's income was below the tax level, this does not explain why her income for 2013/2014 of £1,123.50 (or for 2014/2015) would have been declared as it was well below the tax threshold and so the submission is not made out.
20. I take into account the judgment in Baigazieva (op cit) in which the Court of Appeal clarified that the right to reside is retained on the termination of the marriage but that the criteria for retention are to be considered at the time of the initiation of divorce proceedings. That is confirmed in Gauswami (retained right of residence : jobseekers) India [2018] UKUT 00275 (IAC), relied upon by Mr Tufan, and Mr Walsh did not seek to argue that that was incorrect. The written grounds are misconceived in that they argue that the date of divorce is the relevant date for consideration of the evidence.
21. Divorce proceedings commenced in February 2014 and that is the relevant time for consideration. According to the information from HMRC, and evidence from the appellant, the sponsor's income for the 2013/2014 tax year was £1,123.50 and was paid to her as a net sum of £841.60 on 5 April 2014 to cover 160 hours worked between March and 5 April 2014 (according to the pay slip adduced by the appellant AB;135). This shows that the sponsor did not undertake any work at all in February 2014 and was earning nothing at that time.
22. The evidence before the judge was that she had worked 160 hours between April 2013 - April 2014 (possibly four 40 hour weeks) and that her *entire work for that that tax year* had been carried out between March - April 2014. There was no income recorded at all with HMRC for the previous tax year of 2012/2013. Although a P60 for that tax year was submitted by the appellant and showed an income of £6,096, the judge found that the absence of employment recorded with HMRC for that period made that document unreliable. That was a finding open to him and grounds fail to make any criticism of that.

23. The sponsor's income for 2014/2015, which was somewhat higher, albeit still modest, is irrelevant for this assessment as it was for a period after proceedings commenced, although I accept Mr Walsh's submission that the continuation of the employment may be relevant to the issue of whether it was genuine and effective.
24. I have considered the guidance on the definition of a worker on which Mr Walsh relied and I have also had regard to the judgments in Levin to which he drew my attention and to DV, which had been put before the First-tier Tribunal Judge and on which Mr Tufan relied. I note that Levin is cited in DV which was the case of a Romanian Big Issue seller who worked a 40 hour week but earned less than £2 per hour. The guidance plainly draws on what was said in Levin and repeated in DV about genuine and effective/ marginal and supplementary employment. DV's self-employment was not considered to be genuine in the sense that her earnings did not amount to a meaningful income and did not generate an income which enabled her to be self-sufficient. It should be noted that this was despite the court having found that she had registered herself as self employed and worked regular 40 hour weeks.
25. Submissions were also made on the lower earnings threshold but the guidance makes it plain that the PET is not a basis on which applications are refused by the respondent but which attracts further enquiries as to whether work is genuine and effective. I am not told what the PET was for 2013/2014 but given that I am aware that it was over £8000 the last tax year, it is bound to have been more than £1,124 four years ago.
26. The evidence, as confirmed by HMRC, shows that the appellant was engaged in some activity (whether as a care assistant or a kitchen porter) for one month in the 2013/2014 tax year as there is evidence that she earned an income, albeit just for March-April 2014. However, there was no evidence from HMRC that she worked at the date divorce proceedings commenced or indeed ever before that and the judge was therefore entitled to find that the appellant's submitted evidence was unreliable. Whilst Levin makes it plain that a member state cannot impose a minimum level of earnings to make an EEA national into a worker, the judgment also points out that: "*whilst part time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary*" (at 17: added emphasis).
27. Having considered all the case law, the Regulations, the submissions made and the evidence I reach the following conclusions.
28. As I have already said, the judge was wrong to require the appellant to show that his sponsor had been working throughout their marriage and/or for five years prior to the divorce. However, I am satisfied that this error is not material to the outcome of the appeal.

29. The judge was required to consider whether the sponsor was a qualified person at the date of the commencement of the divorce proceedings.
30. There is no evidence at all before the First-tier Tribunal to show that the sponsor was working in February 2014. Taken at its highest, the evidence is that the sponsor worked for one month only in 2013/2014 and that was for 160 hours between March 2014 - 5 April 2014. The judge commented upon the declared salary for the entire year being paid in one month but no explanation was offered for this by Mr Walsh in his submissions and I was not referred to any evidence to show that the sponsor was a worker at the date divorce proceedings commenced.
31. The judge found it odd that despite several years of marriage, the appellant was not able to provide any information regarding the nature of the sponsor's work and could not explain the discrepancy over whether she was a care assistant or as kitchen porter (at 42-43). The only information as to the hours she worked come from the single pay slip for April 2014 (which I have referred to above) and the appellant did not give any evidence as to what his former spouse did outside those 160 hours. He appeared to know nothing about the agency through which she was given work and said that he had not discussed her work with her (at 33 and 43). The Tribunal did not, therefore, have much assistance from him.
32. Nor was there any information before the judge as to how the appellant and sponsor supported themselves given the sponsor's meagre earnings and the fact that she had only worked for one month in March 2014. Whilst it would have been possible for the sponsor, as a part time worker, to supplement her income from other sources (following Levin), there was no evidence before the judge about this and no submissions on this point were made. The letters of 8 January 2016 and 2 November 2015 in respect of the appellant's employment as a kitchen porter since December 2013 and July 2012 respectively, provide no details of his income at the relevant time and the P60s submitted in his name relate to the period after commencement of divorce proceedings. Therefore, even if the judge had not erred in setting out the correct point in time to consider the sponsor's status, the outcome would have been the same as the evidence did not show that the sponsor was a qualified person in February 2014.
33. Even if, as an alternative, the whole tax year for 2013/2014 had been considered, the judge was entitled to find (at paragraph 60) that this was not genuine and effective employment, having taken into account the guidance in DV which also relied on Levin. That finding is not infected by the misdirection at 61, 62 and 63 of the period during which employment had to be established because the judge's conclusion at paragraph 60 is *specifically* based on the period leading up to the commencement of divorce proceedings. Mr Walsh criticized the judge for a failure to make a finding on whether the work was marginal and ancillary but such a finding would have added little to the conclusion that it was not genuine and effective and indeed certainly follows from that conclusion even if



not specifically made. The sponsor was clearly spending most of her time doing something else.

34. The appellant's challenge fails because the evidence fails entirely to show *any economic activity at all* at the relevant date and there was no argument made that the sponsor was a job seeker or unable to work due to illness or accident. The appellant's challenge is regardless of the error identified.
35. It follows from this finding that the appellant has not shown that he has an entitlement to permanent residence as without a positive finding that the sponsor was a qualified person when divorce proceedings commenced, the appellant cannot achieve the necessary five years which would result in a grant of permanent residence. Neither the requirements of regs. 10(5) or 15 (1)(f) have been met.
36. Mr Walsh made no submissions under article 8, notwithstanding what is argued in the written grounds. I, therefore, conclude that the judge did not err in making no article 8 findings in circumstances where no article 8 claim had been identified or argued.
37. **Decision**
38. The First-tier Tribunal did not make a material error of law which necessitates the setting aside of the decision. The appeal is dismissed.
39. **Anonymity**
40. I make no anonymity order.

Signed



Upper Tribunal Judge

Date: 21 September 2018