



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/00337/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 20 December 2018

Decision & Reasons Promulgated  
On 13 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ADEDEJI OGUNDERU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani of Counsel instructed by Samuel Louis Solicitors  
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Beg promulgated on 14 February 2018 dismissing the appeal against a decision of the Respondent dated 7 August 2016 refusing to grant a permanent residence card under the EEA Regulations.
2. The Appellant is a citizen of Nigeria born on 2 November 1971. It is unnecessary for present purposes to rehearse his full immigration history: suffice to say that pursuant to an application made in October 2010 he was granted a residence card from 7 February 2011 until 7 February 2016 on the basis of his relationship with his then wife Ms Roxanna Astanilze Schotsborg (d.o.b. 1962), a national of the Netherlands.

3. The Appellant applied for a permanent residence card on 5 February 2016. He made his application on the basis of a retained right of residence following divorce. He was married to Ms Schotsborg on 19 April 2008; he has indicated that divorce proceedings were commenced on 1 October 2015; a decree nisi was pronounced on 15 February 2016, and a decree absolute - a copy of which is to be found in the documents on file - was pronounced on 30 March 2016.
4. The Respondent refused the application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 7 August 2016.
5. The Appellant appealed to the IAC.
6. The appeal was dismissed for reasons set out in the Decision of First-tier Tribunal Judge Beg promulgated on 14 February 2018.
7. The Appellant applied for permission to appeal to the Upper Tribunal which was refused in the first instance by First-tier Tribunal Judge Page, but subsequently granted by Upper Tribunal Judge Lindsley on 6 November 2018. Judge Lindsley also extended time in respect of the application for permission to appeal.
8. I am grateful to the helpful manner in which the representatives before me have dealt with the issues in the appeal today. In particular Ms Nnamani guided the Tribunal through the various documents in the Appellant's bundle before the First-tier Tribunal pertinent to the issues underpinning the Appellant's challenge, and Mr Jarvis in turn helpfully and realistically acknowledged the difficulties to be found in the First-tier Tribunal's decision in consequence of scrutiny of the documents.
9. The primary focus of the Respondent's decision, and in turn the primary focus of proceedings before the First-tier Tribunal, was the issue of whether or not Ms Schotsborg was exercising Treaty rights at the relevant time. Before the First-tier Tribunal the date focused upon was the date of the divorce - i.e. the date of the decree absolute, 30 March 2016. It is now common ground before me pursuant to the decision in **Baigazieva [2018] EWCA Civ 1088** that the appropriate date for focus is in fact the date of commencement of divorce proceedings.
10. Irrespective of the relevant date, before the First-tier Tribunal the Appellant relied upon documentary evidence in respect of the claimed economic activity of his ex-wife filed in his appeal bundle. There was no direct evidence from Ms Schotsborg either by way of a witness statement or by her attendance at the hearing to give oral evidence. The First-tier Tribunal Judge sets out her consideration of the documents

at paragraphs 12 and 13 of the Decision, and concluded on a balance of probabilities that there was no credible evidence that Ms Schotsborg was working - and therefore a 'qualified person' - up to the date of divorce on 30 March 2016.

11. However it is now acknowledged by Mr Jarvis that the First-tier Tribunal's analysis appears to overlook, or disregard, a number of documents that are relevant - and indeed are relevant whether the focus is on either the date of divorce or the commencement of divorce proceedings given that both dates fall within the tax year from April 2015 to April 2016.
12. The first pertinent document to which Ms Nnamani directed my attention is a calculation result for 2015/2016 (page 60 of the Appellant's bundle). It is said that this document emanates from the HMRC, and it can be seen to bear a unique reference number and the national insurance number of Ms Schotsborg. On its face it shows Ms Schotsborg declared income of approximately £12,400 by way of profit from self-employment, and indicates her tax liability in consequence and her national insurance contributions.
13. The information shown on this first document is supported by a HMRC self-assessment statement dated 1 December 2016 (page 81). This shows an outstanding tax payment due to the revenue. Also shown is the balancing payment due for the year 2015/2016 - £900.26. A further copy of this document endorsed with a post office receipt stamp indicating the payment of £900.26 on 1 February 2017 is reproduced at page 83 of the bundle.
14. Necessarily it is said that these documents on their face show that Ms Schotsborg not only submitted a tax calculation, but paid tax owed for the tax year 2015/2016. There is yet further evidence of these matters by way of an HMRC document dated 10 September 2017 showing a charge of £45 for 'late payment' (page 69), together with a post office receipt for the payment of £45 (page 82).
15. Because these pertinent documents were not addressed by the Judge, Mr Jarvis acknowledged that the analysis of the First-tier Tribunal was deficient to an extent that amounted to a material error of law.
16. There was a further issue before the First-tier Tribunal in respect of the Appellant's own circumstances and whether, with reference to the Immigration (European Economic Area) Regulations, he was a person who, although not an EEA national, would, if he were an EEA national, be a worker, a self-employed person, or self-sufficient person within the meaning of the Regulations.

17. In this regard again Mr Jarvis acknowledged that the First-tier Tribunal appeared to have erred in stating in substance that it was necessary for the Appellant to demonstrate that he had been working as a self-employed person for a continuous period of five years – *“I do not find that there is sufficient evidence...to confirm that the appellant has been working as a self-employed person for a continuous period of five years”* (paragraph 14). That was not the requirement. It was only necessary that the Appellant demonstrate that he had been so working from the point of the breakdown of the marital relationship. Accordingly Mr Jarvis did not seek to suggest that the error of the First-tier Tribunal in respect of the ex-wife’s economic activity could be ‘saved’ by the Judge’s alternative adverse conclusion expressed at paragraph 14.
  
18. In the circumstances it was common ground before me that the decision of the First-tier Tribunal required to be set aside. Moreover, in circumstances where the exploration of the Appellant’s economic activity by the First-tier Tribunal appeared so very limited, it was also common ground that remaking of the decision in the appeal was most appropriately to be undertaken before the First-tier Tribunal with all issues - although in light of the matters set out above it may be that the First-tier Tribunal will require little more by way of persuasion in respect of Ms Schotsborg’s exercise of Treaty rights. Be that as it may, there will require to be some more careful consideration and evaluation of the Appellant’s circumstances. It is of course a matter for the Appellant whether or not he wishes to file any further evidence in this regard; there is no need for particular directions in this regard – I anticipate standard directions will be issued in due course by the First-tier Tribunal.

### **Notice of Decision**

19. The decision is that the First-tier Tribunal’s decision is set aside for material error of law.
  
20. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Beg.
  
21. No anonymity direction is sought or made.

Signed:

Date: 10 March 2019

**Deputy Upper Tribunal Judge I A Lewis**