



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/04810/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 24 September 2018**

**Decision & Reasons
Promulgated
On 15 October 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**KEBBA SARK NJIE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer of the Specialist Appeals Team

DECISION AND REASONS

1. The Appellant is a citizen of Gambia whose date of birth is 14 August 1980. The Appellant made an application for permanent residence under the Immigration (European Economic Area) Regulations 2006. He asserted that he qualified for a retained right of residence under Regulation 10 and permanent residence under Regulation 15. The application was refused on 4 April 2016 because the Appellant was unable to provide evidence that the EEA Sponsor was a qualified person at the material time, the point of divorce. The Appellant's appeal was dismissed by Judge of the FTT

Wyman in a decision that was promulgated on 31 May 2018 following a hearing at Hatton Cross on 9 May 2018. The Appellant appealed against that decision. Permission was granted to the Appellant by First-tier Tribunal (“FTT”) Judge PJM Hollingworth.

2. The Appellant was married to a Polish national. He was granted a residence card as the spouse of an EEA national exercising treaty rights which was valid until 8 May 2012. They are divorced. The Decree Absolute is dated 9 March 2012. They have a son, born on 6 January 2007. The Appellant has contact with his son following a court order. The Appellant in evidence before Judge Wyman stated that he was unable to provide evidence relating to his ex-wife’s employment because she refused to assist him. The Appellant was not able to produce evidence confirming that the EEA national Sponsor was exercising treaty rights. The appeal was dismissed because the judge was not satisfied that the Appellant had established that the Sponsor was exercising treaty rights at the time of the divorce.
3. At the start of the hearing before Judge Wyman the Appellant’s representative Ms Choudhury made an application for an adjournment to enable the Secretary of State to request evidence from HMRC to establish that the EEA national was exercising treaty rights and if so for what period. Judge Wyman refused the application stating at [22] as follows:

“I explained to Ms Choudhury that I was not prepared to grant an adjournment in this case to accede to her request. In any event there was no Presenting Officer present in court. The decision in this matter was dated April 2016 and the matter was previously adjourned back in October 2017. There had already been a lengthy delay in hearing this case. I pointed out that the burden of proof is on the Appellant, and not on the Respondent.”
4. The Appellant was not represented before me. There were several documents in the Appellant’s bundle which Mr Mills helpfully drew my attention to. The Appellant’s appeal was dismissed on similar grounds in 2013 by Judge Courtney. Mr Mills drew my attention to [26] of Judge Courtney’s decision which reads as follows.

“It was open to Mr Njie to have applied under Rule 50 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 for a witness summons requiring his ex-wife to attend and give evidence as to whether or not she was and had been working. He did not do so. Nor did he seek a direction under Rule 45 requiring the Secretary of State to provide any information necessary for the determination of his appeal.”
5. The hearing was originally listed on 6 October 2017. It was adjourned by FTT Judge NMK Lawrence. I not entirely sure why, but it was not a matter raised at the hearing before me. The Appellant through his solicitors wrote the FTT on 7 September 2017. He applied for a direction under Rule 45 requiring the Secretary of State to provide employment

information relating to the Sponsor. This application was refused by a Duty Judge in the following terms:-

“... the Appellant’s representative must provide a copy of the determination of 19 February 2013 and full details of the name, date of birth, nationality and other helpful information relating to the Appellant’s former partner before the requested direction can be considered.”

6. The Appellant’s solicitors provided the FTT with the required information in correspondence on 13 September 2017. The response of the Duty Clerk was as follows: -

“Thank you for your fax letter dated 13 September 2017. The above appeal file has been taken to the Duty Judge for instructions. The instructions are as follows: -

‘No directions made. This matter was determined by Tribunal Judge Courtney on 19 February 2013’.”

7. Mr Mills indicated that the Secretary of State received a letter from the Appellant’s solicitors a few days before the hearing before Judge Wyman requesting them to make the necessary enquiries with HMRC; however, insufficient time was given to enable the Secretary of State to act on this. Mr Mills confessed that he struggled with the logic of the second decision of the Duty Judge. Mr Mills conceded that there was a procedural irregularity giving rise to unfairness in the light of the circumstances of this case. Mr Mills stated that whether a direction was made or not the intention of the Secretary of State was to obtain the necessary evidence. He stated that the necessary enquiries would be made. He confirmed that the Respondent has the necessary details of the Sponsor to make enquiries. He asked that the matter is not re-listed within six weeks to enable the enquiries to be made.
8. In the light of the concession made by Mr Mills on behalf of the Secretary of State, I set aside the decision of Judge Wyman to dismiss the Appellant’s appeal on the basis that there was a procedural irregularity amounting to unfairness arising from the refusal to adjourn the case. I am not sure that Judge Wyman was made aware of the correspondence Mr Mills referred me to. If not, had she been made aware of it, it is likely she would have granted the adjournment. This would have been a fair outcome in the light of the decision of the judge in 2013 and the more recent correspondence between the Appellant and the FTT.
9. Having set aside the matter I adjourned the hearing. However, it is clear to me that contrary to the indication that I gave the parties at the hearing, this matter should be remitted to the FTT for a re-hearing. I have had regard to Paragraph 7 of the Practice Statement of 25 September 2012 states: Disposal of appeals in Upper Tribunal. I am satisfied that the effect of the error has been to deprive the Appellant of a fair hearing.

10. It is not strictly necessary because of Mr Mills concession and his agreement to make the necessary enquiries, but I make the following directions under Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008: -
1. The Secretary of State is to make enquiries with HMRC relating to the EEA national and whether she was exercising treaty rights at the time of the Decree Absolute and if so over what period.
 2. The appeal will be heard by the FTT not before 6 November 2018.

Notice of Decision

The decision of the FTT to dismiss the appeal is set aside. The appeal is remitted to the FTT for a re-hearing.

No anonymity direction is made.

Signed Joanna McWilliam

Date 9 October 2018

Upper Tribunal Judge McWilliam