Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/12638/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 22 March 2018	**On 01 May 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR MOHAMED HOUSSENE AIDARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Haq, Legal Representative, E Haq & Company
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Mali. On 16 February 2009 he married an EEA national in Mali. Following his wife's admission to the UK in 2012, he was granted a residence card as the family member of an EEA national valid from 26 April 2011 – 26 April 2016. The couple divorced in Mali on 5 February 2015. On 7 April 2016 he applied for a permanent residence card as confirmation of a retained right to reside in the UK following divorce. The respondent accepted that the appellant had divorced and that his marriage had lasted for at least three years and that he and his former spouse had resided in the UK for at least one year during their marriage. The respondent also accepted that the appellant had demonstrated that he had been in

employment since the date of the divorce. However, the respondent refused his application because she was not satisfied (i) that his former spouse was exercising Treaty rights at the date of divorce; or (ii) that his former spouse had shown she was continuously working for a period of five years.

2. The appellant appealed. The evidence produced by the appellant at the hearing included an accountant's report from Northwest Associates dated 10 October 2015 showing a schedule of profit of £10,076 for year ended 5 April 2015. In a decision sent on 2 October 2017 Judge Graham of the First-tier Tribunal (FtT) dismissed his appeal; broadly for the same reasons given by the respondent for refusing his application.

3. The appellant's grounds of appeal can be classified as essentially threefold. They stated first of all that the judge had erred in not accepting the former wife's evidence of self-employment during 2014/5. In this regard it was pointed out that the judge held against the appellant the lack of a P60, which was not a document a self-employed person possesses. The grounds contend, secondly, that the judge erred in criticising the appellant's former spouse's employment activities between 2011 and 2014 as "marginal and ancillary" - having regard to **Suraya Begum [2011] UKUT 00259 (IAC)**. The grounds contend thirdly that the judge erred in finding that the appellant had not shown that he was working at the date of decision.

4. It is convenient to take the grounds in reverse order, taking the third ground first. Whilst the judge was correct to identify that the appellant had not produced recent payslips to demonstrate he was still employed, no issue had been taken by the respondent to show he failed to meet the requirements of regulation 10(5) of the Immigration (European Economic Area) Regulations and so the appellant had not been put on notice of the need to produce up-to-date evidence. Hence it was wrong of the judge, without giving the appellant proper opportunity to produce up-to-date evidence to hold its lack against the appellant. The appellant has now produced documentary evidence clearly demonstrating that he was continuing in employment at the date off hearing. In light of that Mr Richards sensibly conceded that the judge was in error on this point but argued that it was a not a material error unless the appellant could demonstrate legal error in the judge's other main findings. Mr Haq did not demur.

5. Turning to the appellant's second ground, I consider the judge's assessment at paragraph 14 that the ex-spouse's employment from between tax years 2011 – 2014 was "marginal and ancillary, especially 2011" (when the account showed a little over 2,000) to be contrary to the evidence. Whatever the precise position as regards continuity (a matter I will deal with separately below), the documentary evidence provided by the appellant included his former spouse's P60s for three tax years ending 2011, 2012, 2013, 2014 in the last three of which her earnings were recorded as being over £6,000. Such a record is not consistent with employment undertaken being marginal and ancillary. The fact that the income was concluded by the judge to be low and reflective of limited working hours was insufficient to show that the economic activity was marginal or ancillary.

6. It remains common ground that the appellant could only succeed under the Regulations if able to show (i) that his former spouse was exercising Treaty rights at the time of the divorce; and (ii) that she had been exercising treaty rights continuously for a five year period. As regards (i), the judge stated at paragraph 12:

> "12. I make the following findings. I am satisfied the Appellant cannot meet the 2006 Regulations for permanent residence for the following reasons. At the date of divorce there is insufficient evidence before me to show that the EEA sponsor was employed and receiving an income from self employment as a hairdresser. The only evidence before me is in the form of an income statement and a HMRC tax return showing that the tax payable was paid late. There is no P60 for 2014-2015, there are no bank statements or business transactions of any type to show that she was receiving any form of income."

This brings into focus the appellant's first ground of appeal.

7. I agree with the appellant that the judge's reasoning here betrays misunderstanding, at least insofar as the judge in para 12 meant to assess the appellant's evidence of self-employment. However, this paragraph has to be read together with paragraph 8 in which the judge stated:

> "8. He accepted that he was unable to submit all of his former spouse's wage slips for the relevant period. However, he referred to a document from her accountant, Northwest Associates (Appellant's bundle at 1) which showed that at the time of divorce, she was a self-employed hair dresser. He said she began this self employment in 2014. The Appellant accepted that the only evidence of her self-employment was an income statement (page 4) for the year ending the 5th April 2015, and the receipt from HMRC (page 3) which showed that the tax payable figure (on page 10) of £206.20 was paid on the 9th August 2017."

8. This shows that the judge did not overlook the full extent of the evidence relied on by the appellant to prove his wife's self-employment since the end of the 2013-2014 tax year. In particular, it shows that the judge clearly did take fully into account the document from her accountants, Northwest Associates stating that she was a self-employed hairdresser. It was open to the judge to assess that this evidence did not demonstrate self-employment at a level sufficient to constitute exercise of Treaty rights, since the accountant's letter was not supported by any bank statements or business transactions of any type to show that she was receiving any of the income mentioned, in the accountant's letter. I remind myself that an accountant's letter can only be based on figures provided by a client and in the absence of annexures referencing specific amounts paid to the appellant, such a letter cannot self-prove the actual activity of self-employment.

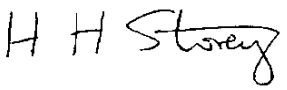
9. In the absence of any error in the judge's assessment of the appellant's former wife's self-employment from April 2014 onwards, it is clear that he could not show she had been continuously employed for a five-year period prior to the couple's divorce in February 2015.

10. For the above reasons, I conclude that despite the judge falling into error in limited respects in relation to the appellant's own and his former wife's history of employment, these had no material impact on the judge's reasons for concluding that the appellant could not meet the requirements of regulation 10 in full.

11. Accordingly the judge's decision shall stand.

12. No anonymity direction is made.

Signed: Date: 26 April 2018



Dr H H Storey
Judge of the Upper Tribunal