Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12848/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 02 August 2018	**On 06 September 2018**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

BANKOLE OKEOWO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Miss S. Ferguson, instructed by SLA Solicitors
For the respondent: Miss J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 17 October 2016 to refuse to issue a residence card recognising a permanent right of residence as the family member of an EEA national who had a retained right of residence.

2. First-tier Tribunal Judge Asjad ("the judge") dismissed the appeal in a decision promulgated on 18 February 2018. The judge noted that there was no dispute that the appellant married an EEA national on 8 June 2010 and that the couple divorced on 19

October 2015 (the date of the Decree Absolute). The judge made the following findings:

> "7. I find that the EEA Sponsor (Soares) was a self-employed person during the period 12/03/11 to 01/04/2014. Evidence of her self-employment has been provided in the form of a letter from her Accountants (at 97) that confirms she commenced her self-employment on the 12th of March 2011 and was trading as 'Neuza Maria Hairdresser Beuticia'. There are in addition, tax returns for the following periods:
>
> 2011/2012 – pages 6-9
> 2012/2013 – page 84
> 2013/2014 – page 87
>
> In addition, there are National Insurance Class II contributions bills for the period: 2011(93), 2012(89), 2013(90), 2014(91). Evidence that the business was advertised in the Small Business Directory and yell.com was also provided (101 and 103).
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> 8. There is I find no evidence apart from small reference in the Accountants Letter, to the EEA Sponsor's self-employment in 2015. There are no tax returns or National Insurance Bills for the period 2014/2015. It follows that at the date of the divorce, the 19th of October 2015, it has not been shown that the EEA Sponsor was exercising treaty rights in the UK. I accept that that the Appellant has demonstrated that he has been working and has been self-employed since that date as a 'Qualified Person' but in the absence of any evidence of the EEA Sponsor's status in 2015 I am unable to find that the 5-year period is met in this case."

3. First-tier Tribunal Judge Froom granted permission to appeal to the Upper Tribunal in the following terms:

> "1. The FtTJ arguably failed to make sufficient findings of fact regarding the sponsor's self-employment/employment in 2015 and arguably erred in failing to give any reason for not relying on the P60 for the tax year 2015/2016.
> 2. It is not clear, although the FtTJ could not have known it, that the "date of termination" is the date divorce proceedings were commenced (see Baigazieva [2018] EWCA Civ 1088). It is therefore necessary to make a finding as to when that was."

Decision and reasons

4. It is not necessary to make detailed findings relating to the error of law in the First-tier Tribunal decision because Ms Isherwood accepted that the decision involved the making of an error following the Court of appeal decision in *Baigazieva*. The judge cannot be criticised because the decision was issued after he heard this appeal, but the Court of Appeal since found that the relevant date of assessment for the purpose of regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 is the date divorce proceedings are initiated and not the date when the proceedings are finalised.

5. The judge found that there was evidence to show that the appellant's spouse was exercising rights of free movement from March 2011 onwards. However, he concluded that there was little evidence to show that she was a 'Qualified Person' in

2015. The appellant argues that the judge failed to take into account a copy of a P60 for his wife's employment during the tax year 2015-2016. The P60 showed that she earned £9,723.66 from employment with Cathy Care Ltd in that tax year. The evidence was relevant to a proper determination of the appeal. The failure to take into account a material consideration also amounts to an error of law. The decision is set aside.

6. The decision must be remade with reference to the correct date of assessment, which is the date when divorce proceedings were initiated. In his witness statement, the appellant made clear the divorce proceedings commenced in June 2015. In fact, it makes little difference in this case because the date of the commencement of the proceedings and the Decree Absolute fall within the same tax year covered by the P60. Given that the appellant's wife had been earning an income from self-employment as a hairdresser for several years. There is some evidence to suggest that she continued trading in 2014 and 2015. A letter from Jecom & Co Accountancy Services dated 01 April 2016 states that the appellant's spouse continued to trade as Neuza Maria Hairdresser Beauticia in October 2015 (covering the period when the divorce proceedings commenced) and this was reflected in the profit and loss account for 2015. The appellant does not appear to have been able to obtain a copy of the accounts or his wife's tax returns for that period. However, it is at least likely that she may have been earning an income from self-employment during 2015 in light of the other evidence showing trading over previous years. The P60 indicates that the appellant's wife was likely to be supplementing her income with employed work at the relevant time.

7. To require specific evidence to show trading or employment for the exact date in June 2015 would apply too high a standard of proof. I am satisfied that the evidence, as a whole, shows that it is more likely than not that the appellant's wife was exercising rights of free movement at the date when divorce proceedings were initiated in June 2015. The appellant was residing in accordance with the regulations at the date divorce proceedings were initiated and therefore met the requirements of regulation 10(5). There is evidence to show that the appellant was likely to be working at the relevant time in mid-2015 and therefore met the requirements of regulation 10(6).

8. The appellant resided in the UK as the family member of an EEA national from 2011 and retained a right of residence in 2015. Having retained a right of residence he has continued to reside in the UK in accordance with the EEA Regulations 2006. I am satisfied that the appellant has resided in the UK in accordance with the regulations for a continuous period of five years and that he meets the requirements of regulation 15 of the EEA Regulations 2006.

9. The First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside, remade and the appeal is allowed.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The appeal is ALLOWED under the EEA Regulations 2006

Signed  Date 03 September 2018
Upper Tribunal Judge Canavan