Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/14176/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Friday 2 November 2018	**On Friday 16 November 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SOLOMON GYAMFI

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Layne, Counsel instructed by Andy D Legal and Immigration Associates
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. By a decision promulgated on 27 July 2018, I found an error of law in the decision of First-Tier Tribunal Judge Coutts promulgated on 3 April 2018 dismissing the Appellant's appeal against the Secretary of State's decision dated 2 December 2016 refusing him a permanent right of residence based on his retained rights as the former spouse of an EEA (French) national, Ms [SK]. I set

aside Judge Coutts' decision and gave directions for the re-making of the decision. My error of law decision is annexed to this decision for ease of reference.

2. The background facts are adequately set out at [2] and [3] of my error of law decision and I do not repeat them. I also have regard to the evidence set out at [18] and [19] of my earlier decision. The Judge's misunderstanding as to what that evidence shows is the basis on which I found an error of law.

Submissions

3. I received written submissions from the Respondent immediately before the hearing. Having regard to my earlier decision, the Respondent no longer takes issue with whether Ms [SK] (the Appellant's ex-wife) was exercising Treaty rights as at the date of divorce on 30 March 2016 (see in particular the evidence cited in second bullet point at [18] of my earlier decision). That evidence also shows a reasonably complete picture of employment for Ms [SK] between June 2010 (when the Appellant applied for the residence permit which was later granted) and the date of divorce, over five years later.

4. The only point on which the Respondent takes issue in his written submissions is whether there is evidence that the Appellant has himself been exercising Treaty rights as if he were an EU national at all relevant times. As Mr Melvin pointed out at the hearing, the Respondent's consideration of this issue was confined to the documents which the Respondent had before him when the application leading to the decision under appeal was made. The Respondent was not represented at the hearing before the First-tier Tribunal and did not therefore have the Appellant's bundle.

5. I therefore passed to Mr Melvin the Tribunal's copy of the Appellant's bundle and gave him time to consider the documents put forward in support of the Appellant's employment. Mr Melvin accepted that the documents showed that the Appellant was employed in the period October 2011 to 2016. Accordingly, he accepted that the Appellant meets all the requirements for permanent residence on the basis of a retained right of residence as at the date of hearing (and as at the date of the Respondent's decision under appeal).

Decision and reasons

6. In light of the Respondent's concession which I consider to be rightly made and in light of the evidence as set out in my earlier decision (in relation to Ms [SK]'s employment) and that accepted by the Respondent in relation to the Appellant's own employment, the Appellant is entitled to a permanent right of residence on the basis of a retained right of residence following his divorce from his EEA national spouse.

DECISION

The Appellant's appeal is allowed under the EEA Regulations 2006

Signed  Dated: 12 November 2018

Upper Tribunal Judge Smith

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/14176/2016

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On Monday 16 July 2018

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SOLOMON GYAMFI

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Adama-Adams, Counsel instructed on a direct access basis by the Appellant
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Coutts promulgated on 3 April 2018 ("the Decision") dismissing the Appellant's

appeal against the Secretary of State's decision dated 2 December 2016 refusing him a permanent right of residence based on his retained rights as the former spouse of an EEA (French) national, Ms [SK]. The Respondent's decision is made under The Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. The Appellant is a national of Ghana. On 14 June 2010, the Appellant applied for a residence card as the spouse of Ms [SK] which was granted valid until 3 November 2015. The couple were divorced on 30 March 2016. The Appellant applied for permanent residence on 26 May 2016. That was refused by the decision under appeal.

3. The Respondent accepted that the marriage had lasted for at least three years prior to divorce and that the parties had lived together in the UK for at least one year. However, the Respondent was not satisfied that Ms [SK] had been exercising Treaty rights at the date of the divorce or that they had both been residing here under the 2006 Regulations for five years before that date. The Respondent was also not satisfied that the Appellant had been residing in the UK as if he were an EEA national since his divorce.

4. The Respondent was not represented at the hearing before the First-tier Tribunal. The Judge found at [18] of the Decision that Ms [SK] was exercising Treaty rights at the time of divorce. However, the Judge did not accept that she had been exercising Treaty rights for a period of five years prior to the divorce. The Judge did not therefore go on to determine whether the Appellant was residing in accordance with the 2006 Regulations before or after his divorce.

5. The Appellant's grounds of appeal turn on the interpretation of Regulations 10 and 15 of the 2006 Regulations. He says that the Judge was wrong to require proof that Ms [SK] had been exercising Treaty rights throughout a continuous five years' period. He says that he is required to show only that he has been exercising Treaty rights throughout that period. He relies in that regard on Regulation 15(1)(b) of the 2006 Regulations.

6. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 2 June 2018 in the following terms:

> "[1] The application for permission was out of time. I extend time in the light of the factors. I grant the application. The Respondent was not represented at the hearing before the Judge. Given the Judge's findings and reasons it is arguable that the presence of the Respondent would have enabled enquiry to have been made with HMRC as to whether any further evidence was available in relation to the exercise of treaty rights by the Sponsor. It is arguable that the absence of a representative for the Respondent deprived the Judge of the opportunity for making such enquiry and has potentially led to unfairness or unfairness which can be seen to have arisen in the circumstances. In the alternative it is arguable that the interpretation of the Regulations set forward in the permission application has not attracted a sufficient analysis from the Judge."

7. The matter comes before me to decide whether the Decision contains a material error of law.

Decision and Reasons

8. Since the last sentence of the permission grant does apparently find arguable the grounds of appeal which were actually put forward by the Appellant, I will begin with those grounds even if they were not pursued with any vigour (or indeed at all) by Mr Adama-Adams.

9. The Appellant was right to abandon reliance on the pleaded grounds for the following reasons.

10. The application which the Appellant made was for a permanent right of residence. As the Respondent's decision makes clear, therefore, Regulation 10(5) and (6) has to be read with Regulation 15(1)(f) which provides that a non-EEA national family member will only have the right to reside permanently in the UK provided that he "has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years". In other words, the Appellant must show that he has been the family member of an EEA national exercising Treaty rights (or on some other basis under the Regulations) for a period of five years as well as showing, as the Appellant has done, that the marriage has lasted for at least three years and that the parties lived together in the UK for at least one of those years.

11. I turn then to the main basis on which permission was granted which is on a ground which is not pleaded by the Appellant. In essence, the basis of the grant is that, because the Respondent was not represented at the hearing before Judge Coutts, the Appellant lost the opportunity to plug gaps in the evidence he had about Ms [SK]'s employment, as a result of which the Appellant was unable to satisfy the requirements of the 2006 Regulations.

12. There are a number of reasons why I am not satisfied that there is any error in this regard.

13. First, the Appellant did not himself complain of any unfairness in this regard. I recognise that a Judge can be expected to identify any procedural unfairness for himself. However, the Appellant was represented by Counsel who could be expected to raise any such issue on his behalf. It cannot be said that the procedure was obviously unfair in circumstances where the Appellant had managed to produce some documentation about Ms [SK]'s employment.

14. Second and more importantly, if the Appellant wished to seek a direction that the Respondent obtain information as to Ms [SK]'s working history, he did not need to wait for the hearing in order to do so. Neither would the absence of the Respondent at the hearing before Judge Coutts have prevented an application on his behalf for an adjournment and request for such a direction. However, as Mr Tufan pointed out, no such application has been made or even intimated

until Judge Hollingworth granted permission in the way that he did (and in fact no such application for a direction is made even now).

15. Third, the Appellant was able to supply quite a lot of documentation about Ms [SK]'s working history. Generally, in such cases, the former spouse will have access to documents from the time when the marriage was subsisting but will be in difficulties obtaining evidence from the period after the marriage has broken down. Here, the Appellant was clearly able to provide documentation for the latter period and for most of the five years' period but could not provide documents for a period in 2011 and 2012.

16. That then leads me on to the basis of Mr Adama-Adams' oral submissions to me which focussed rather less on any unfairness arising from the Respondent's absence and the Appellant's inability to obtain the necessary documents and more on what he said was a failure by the Judge to exercise flexibility in relation to the documents which were produced. That was perhaps in recognition of the factual difficulty, as identified above, that the Appellant had not actually taken any steps to ask the Respondent to provide the documents at any stage (including after Judge Hollingworth's permission grant).

17. The focus of Mr Adama-Adams' submissions is [27] to [34] of the Decision which reads as follows:

> "[27] Unfortunately, the evidence produced by the appellant in respect of the sponsor's employment situation is incomplete. The appellant accepts the same but asks that I take an overview or holistic approach to assessing matters because this is all the information that he can provide; he is no longer in contact with the sponsor and does not know her whereabouts.
>
> [28] For tax year 2015, I am prepared to take such an approach because, in addition to some payslips, there is a P60 produced for the sponsor showing her end of year earnings for that tax year.
>
> [29] I am also prepared to do so for tax years 2013 and 2014, notwithstanding that there are no payslips produced, because these are also supported by P60s showing end of year earnings for the sponsor which are broadly consistent with each other and the later tax year of 2015.
>
> [30] There is no P60 produced for tax year 2016 which is not surprising as this would not have been available at the time of the appellant's divorce from the sponsor and I have already indicated above that I accept that treaty rights were being exercised at the time of the divorce on 30 March 2016.
>
> [31] This leaves tax year 2012 and the first three months of 2011.
>
> [32] I find that I am unable to be as flexible here in approach as I have been with the other tax years. The payslips produced do not show a complete period as there are only seven months for 2012 and the month of January is missing in 2011; moreover, there are no P60s produced for these tax years.

> [33] I therefore cannot be satisfied that the sponsor was employed continuously during these periods and therefore exercising treaty rights for the required five years prior to her divorce from the appellant.
>
> [34] If P60s had been provided for these tax years as well then it would have been open for me to conclude with any level of earnings shown that employment was likely to have continued throughout the period; however, this was not the case."

18. I agreed that, in considering the Appellant's submission, I would need to assess for myself the evidence which the Judge had before him in relation to Ms [SK]'s exercise of Treaty rights. That is as follows:

- Payslips from NBS Guarding (UK) Ltd for the months of June 2010 to March 2012 inclusive except those for August, September and December 2010 and January, June to August and November 2011. Those payslips showing monthly income of roughly £320 per month;
- Payslips from Hashmat Property Maintenance Ltd for the months from April 2015 to March 2016 inclusive showing income of roughly £425 per month rising to roughly £620 per month from September 2015;
- P60 for year ending 5 April 2013 showing income of £3930.46
- P60 for year ending 5 April 2014 showing income of £4557.16
- P60 for year ending 5 April 2015 showing income of £5039.20

19. In considering the documents before the Judge, it is immediately apparent to me that there is an error in what is said by the Judge at [32] of the Decision. In fact, the Judge appears to have confused at [22] of the Decision documents which relate to 2011 and not 2012. As such, there was a relatively complete picture of Ms [SK]'s employment from June 2010 to March 2012 but nothing thereafter until April 2015. There are gaps of eight months within that period but documents either side of those gaps which show that Ms [SK] was working for the same employer on roughly the same wage. Thereafter, the gap in documentation is covered by the P60 for the year ending April 2013 which shows that she earnt £3930.46 which is consistent with the monthly wage which she was earning up to end of March 2012.

20. Although neither party drew my attention to this error, it is an obvious error of fact. The next issue which arises is whether that error of fact is capable of amounting to an error of law.

21. I have regard to the Court of Appeal's judgment in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 which deals with this issue. At [66] of the judgment, the Court of Appeal set out its approach to the issue of whether an error of fact can amount to an error of law as follows:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of

> law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

22. Although E and R was an asylum case, it arose from a statutory appeal before this Tribunal (or its predecessor) and I see no reason to distinguish it simply because the current case involves determination of the Appellant's status under EU law. In terms of the factors raised, the Judge has clearly misunderstood the documentation relating to Ms [SK]'s employment. That evidence was in fact before the Judge and as such the error of law is not simply one predicated on the error of fact but is also a failure to take into account material evidence by reason of the misunderstanding of what that evidence shows. The evidence which the Judge misunderstood and his finding on that evidence is clearly material to the legal issue which he had to decide. Indeed, the Judge's mistake was the sole reason for him dismissing the appeal (although it is fair to note that he did not go on to consider whether the Appellant had also shown that he was exercising Treaty rights as if he were an EEA national during the relevant period). Accordingly, the mistake has given rise to unfairness which amounts to an error of law. As I have also noted, separately, it also gives rise to a failure properly to consider material evidence which is itself an error of law.

23. For that reason alone, I find that there is an error of law. That error is capable of being material since the evidence may well be sufficient to show that Ms [SK] was working for the relevant five years' period. However, since the above analysis of the documentation and the error committed by the Judge was not brought to my attention by either party in the course of the hearing before me, I do not re-make the decision on that basis. In any event, I cannot do so without hearing from the parties in relation to the final issue of whether the documents show that the Appellant has himself been exercising Treaty rights throughout the period. That was also put at issue in the Respondent's decision.

24. For that reason, I have given directions below for a resumed hearing to re-make the decision.

DECISION

I am satisfied that the Decision contains a material error of law. I therefore set aside the decision of First-tier Tribunal Judge Coutts promulgated on 3 April 2018. I give the following directions in relation to the re-making of the decision

DIRECTIONS

This appeal is to be relisted for an oral hearing in order to re-make the decision on the first available date after 28 days from the date when this decision is sent. Time estimate ½ day.

Signed  Dated: 24 July 2018

Upper Tribunal Judge Smith