Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: EA/06077/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On: 6th March 2019	**On: 12th March 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Eric Oworaw Ansah

(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lourdes instructed by JML Solicitors.

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Ghana born on 20th May 1986 and he was granted permission to appeal against a decision of First-tier Tribunal Judge Monson, promulgated on 28th December 2018. The First-tier Tribunal Judge dismissed an appeal against the decision of the Secretary of State dated 14th June 2017 which

refused his application for ***permanent*** residence as the former spouse of Ms A L A on the basis that he had not provided evidence of a retained right of residence further to Regulation 10(5) and 15(1)(f) of the Immigration (European Economic Area) Regulations 2016.

2. The Secretary of State refused the application for a residence card because he had not shown that his EEA national former spouse was a qualified person or had permanent residence on the date of the termination of the marriage. He had also failed to demonstrate that between him and his sponsor he had collectively exercised Treaty rights for a continuous period of five years. The information provided within his application to the Secretary of State relating to the sponsor's exercise of treaty rights ran to the 27th February 2014 only. The documents indicated earnings from April 2011 onwards and 'your sponsor's employment is then comprehensively documented (across payslips, P 45s, P 60s, bank statements, and employer correspondence) continuously to the point of a final payment made on 27th February 2014'. The Secretary of State therefore recognised the sponsor's exercise of Treaty rights between 6th April 2011 and 27th February 2014. The Secretary of State identified that the covering letter with the application indicated that the sponsor thereafter moved to self-employment but no financial evidence nor any other information relating to the self-employment had been supplied with the application other than an HMRC letter dated 10th June 2014 indicating that his sponsors registration as self-employed had failed due to an incomplete online application. As the reasons for refusal letter noted, the covering letter with the application identified that the appellant lived with his ex-wife up to the point of divorce and the point of divorce began only from the date they submitted their divorce petition. The Secretary of State concluded that it was therefore reasonable to expect him to be able to provide sufficient documentation to evidence how his former spouse was exercising treaty rights until that same point January 2015. Documentation such as joint BT billing continued to the point of the sponsor's petition for divorce.

3. In the determination the First-tier Tribunal judge recorded that

(i) the evidence before him comprised the bundle of documents filed by the Home Office, the bundle of documents filed by the appellant's solicitors and a witness statement from I L of HMRC dated 30th November 2018 which had been produced pursuant to an 'Amos' direction made by the Tribunal on 18 June 2018.

(ii) the appellant married his EEA national sponsor on 20th January 2011, and he was issued with a five-year residence card on 6 December 2011 which was valid until the 6th December 2016. The divorce petition was issued on 15th January 2015 and the decree absolute granted on 23 October 2015

(iii) Mr I L of the HMRC in his witness statement confirmed

(a) there was no HMRC self-assessment tax record held for the sponsor

(b) there was no employment record held by HMRC for the sponsor for the tax year ending April 2015 or the tax year ending in 2016

(c) between 6th of April 2013 and 21st April 2014 the sponsor earned £4813.20.

(d) between 6th of April 2013 and 5th of April 2014 the sponsor earned nothing as an employee Bayleaf Cleaning Ltd

(iv) the judge found the appellant had not discharged the burden of proving that his ex-spouse was exercising the right at the time that she all the appellant filed the divorce in January 2015 (**Baigazieva** [2018] EWCA Civ 1088)

(v) the earliest evidence of the sponsor exercising treaty rights was from April 2011 and therefore it followed she had not shown that she had acquired permanent residence by 21 February 2014. There was no evidence of any meaningful economic activity on her part after February 2014 and the appellant and the sponsor had only been married for just over 3 years

(vi) The ex-spouse had not been shown to be exercising treaty rights from 21st February 2014 and thus the appellant was not able to show he qualified for a permanent right of residence either on the basis that he had resided in accordance with the EEA regulations for 5 years continuously or on the basis that collectively he and the sponsor had exercised Treaty rights over a continuous period of 5 years.

Application for Permission to Appeal

4. The application for permission made stated that the determination contained material errors of law, specifically that the Tribunal, when requesting information from HMRC in response to the 'Amos' direction cited the wrong National Insurance number for the spouse. The witness statement from I L recorded an NI number which 'may have used briefly' (sic) until the acquiring of another number as quoted in the letter of 7th June 2018. The Tribunal had erred in law in taking this information into account and had not followed the direction contained in Rule 4 of the Tribunal Procedure Rules. Further the Tribunal should have found that the Respondent in this case had not ensured that the Section 40 of the United Kingdom Borders Act 2007 'conditions' had been followed by HMRC. The Tribunal had erred in law in not spotting that the NI number mentioned on 7th June 2018 'is matching in the information that has been submitted in the statement from the HMRC' (sic). J2 (a previous P60 of the ex-spouse) in the bundle demonstrated that the NI number of the spouse was SJ ** ** 31 A.

The Hearing

5. At the hearing Mr Lourdes submitted that there were two NI numbers for the spouse and that the Tribunal direction had not reflected this. Hence the information from the HMRC was incomplete and this the judge had not taken into account.

6. Mr Melvin submitted that the HMRC record did indeed reflect the NI numbers.

7. When I suggested that the Tribunal had made a direction in accordance with the request and letter of the appellant's previous solicitors Elegant Law, Mr Lourdes submitted that the appellant should not be visited with the faults of the solicitors.

Conclusions

8. The First-tier Tribunal set out the key issue which is whether the appellant's former spouse had been exercising treaty rights for 5 years by the date of divorce or whether the appellant had shown he had retained rights of residence through demonstrating the spouse was exercising Treaty rights at January 2015, the point of divorce. There was no evidence that the former spouse had exercised Treaty rights prior to 2011 and the marriage only took place in 2011. The relevant timescales were addressed by the judge.

9. The former solicitors acting for the appellant, until the application for permission to appeal, namely Elegant Solicitors, made a specific request for the 'Amos' Direction in a letter to the Tribunal dated 7th June 2018. In that letter the NI number given for the spouse was SK ** ** 56 B. The correct full name of the spouse and her date of birth was given. There was no dispute as to those details. Subsequently it was argued that the documentation at J2 of the bundle showed that there was an alternative NI number (given above). Not only did the Tribunal carry out the request for a direction in the form requested by the former legal representatives and there was no evidence of any complaint, but the HMRC made no reference to either NI number given. There can be no criticism of the Tribunal failing to undertake the request properly and thus of the judge for taking into account the HMRC witness statement.

10. The witness statement from the HMRC clearly set out the full name of the spouse and her date of birth. The search was conducted on that basis and the only number given was that which was described as a temporary NI number 'used for HMRC purposes only'; that bore no relation to either of the two NI numbers given for the ex-spouse and was apparently for HMRC purposes only. The Pay as you Earn Tax record for the spouse for 2013-2014 referred in the 'tax year record' to two companies 'Bayleaf Cleaning Ltd' for which no income was recorded but also Supervision Assured Ltd and identified that the former spouse had earned £4813.20 between' 06-04-2013 and 21-02-2014'. This, however, was the company which issued the P60 and used NI number SJ ** ** 31 A, at J2 of the respondent's bundle and the same NI number which the Tribunal or Judge was supposed to have spotted. This employer, Supervision Assured Ltd, did use the NI number which it was asserted should have been used and referenced by the Tribunal. This record was therefore detected by HMRC and correlates with the records supplied by the Home Office and with the alternative NI number. Thus, the HMRC accessed the records for the ex-spouse in relation to *both* NI numbers. The witness statement also records that for the tax years 2014-2015 and 2015 and 2016 there was 'no employment record held'.

11. As the First-tier Tribunal Judge found, there was no evidence that the former spouse had acquired permanent residence, there was no record of any economic activity prior to 2011 and there was no indication of any economic activity or exercise of Treaty rights by the ex-spouse at the point of divorce. The only evidence in relation to self-employment was a letter of 10th June 2014 indicating that his sponsor's registration as self-employed had failed due to an incomplete online application.

Indeed, the Secretary of State noted that the documentation provided by the appellant indicated joint billing beyond the date of divorce.

12. Mr Lourdes tried to persuade me that, in the alternative, the respondent should have sought evidence in relation to the appellant's former wife being a jobseeker. That was not raised before the First-tier Tribunal and **Amos v SSHD** [2011] EWCA Civ 552 is not authority for the shifting of the burden of proof to the respondent from the appellant. Paragraph 40 of **Amos** explains that it is for the appellant to seek the relevant directions for a witness summons or a direction requiring the Secretary of State to provide any information necessary.

13. The request made to the Tribunal was for tax records from HMRC not information from any other department about Jobseeking status which would no doubt emanate from the Department of Work and Pensions (a different department). Even if that were the case, which it was not, as stated at paragraph 42 of **Amos**:

> *'42. The context in Kerr was social security rather than immigration, a relevant distinction, as appears from the citation from Diplock J and Baroness Hale's conclusion from it. Even so, Baroness Hale was careful to limit her comments to information held by the department in question. Kerr is not authority for the proposition that the Department for Social Development of Northern Ireland, the appellant in the appeal, was under any duty to obtain information available to other government departments or authorities. Even if transposed to the present context, it is not authority for the proposition that the Home Secretary is bound to make enquiries of other government departments for evidence they may or may not have concerning issues before the Tribunal'*

14. I find no legal error in the judge's assessment of the evidence nor in his conclusions which were reasoned and thorough. There was no error on the part of the Tribunal in the request. The decision of the First-tier Tribunal will stand. Mr Ansah's appeal remains dismissed.

Signed *Helen Rimington* Date 6th March 2019

Upper Tribunal Judge Rimington