Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00050/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Tuesday 14 September 2021	**On Friday 15 October 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR FRANCIS AWUAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Jaufarally, solicitor, Callistes solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant challenges the decision of First-tier Tribunal Judge Plumptre promulgated on 5 February 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 16 December 2019 refusing to give him a permanent residence card as the former family member (spouse) of an EEA (French) national, Ms Simone Gabriel. The Respondent's decision

was made under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. By a decision sent on 11 June 2021, I adjourned the error of law hearing in this appeal. My adjournment decision is appended hereto for ease of reference. That decision sets out the factual and procedural background to the appeal and I do not repeat it.

3. The reason for the previous adjournment was in order for the Respondent to obtain information from HMRC via an Amos direction made in my decision concerning the employment history of Ms Gabriel. In short summary, the error in the Decision asserted by the Appellant is a failure by the Judge to consider whether the Appellant had acquired permanent residence by reason of Ms Gabriel's exercise of Treaty rights in the period 2007 to 2013 (see basis of permission grant set out at [7] of my decision). As was accepted on that occasion on the Appellant's behalf, there was no evidence about Ms Gabriel's employment in the period January 2008 (when the Appellant married her) to April 2013 (see [12] of my decision). The argument put forward on the Appellant's behalf was that, if Ms Gabriel were to be shown as employed in the UK for that period, the Appellant would be entitled to permanent residence. The error made by Judge Plumptre is said to be a failure to consider that argument.

4. As I pointed out at [13] of my decision, although there was no evidence, the factual position could be readily clarified by the making of an Amos direction. If that evidence did not assist the Appellant, then that would be the end of his argument and either Judge Plumptre would not have made an error in the Decision by failing to consider the issue or, at best, any error would not be material as the argument would be unsupported in fact.

5. On 12 July 2021, in response to the Amos direction, the Respondent filed a witness statement of Louise Hodges, an officer of HMRC, dated 8 July 2021. The statement confirms the details held about Ms Gabriel (name, date of birth and address). It confirms the temporary reference number held for her by HMRC (that number is an internal one used for HMRC purposes only). It confirms that there is no self-assessment tax record held for Ms Gabriel and no PAYE records for the tax years 2007/8 to 2012/13. That evidence supplements the evidence and submissions which were before Judge Plumptre as recorded at [10] and [11] of the Decision. That therefore is the totality of the evidence about Ms Gabriel's employment history in the relevant period. Based on that evidence, Judge Plumptre was entitled (indeed bound) to reach the findings she did at [13] to [16] of the Decision. Paragraph [16] of the Decision is particularly pertinent. Judge Plumptre was entitled to reject any inference that Ms Gabriel had been working in the period 2008 to 2013. Indeed, based on the evidence now received from HMRC, she was right to find that Ms Gabriel had not been working for that period.

6. Mr Jaufurally very fairly conceded having seen the statement from HMRC that he could not sustain the argument previously put forward and, based on what I said at [13] of my adjournment decision, the outcome was inevitable. He could no longer submit that there was an error of law in the Decision. Even if Judge Plumptre had failed to note the possibility of the Appellant claiming permanent residence, any error in that regard could not be material as the outcome on the evidence now would inevitably be the same.

CONCLUSION

7. For the foregoing reasons including the concession made on the Appellant's behalf, I am satisfied that there is no error of law in the Decision. Judge Plumptre in fact considered whether there was sufficient evidence of Ms Gabriel working in the period 2008 to 2013. Although she did not do so in the context of an argument that the Appellant would be entitled to permanent residence, she was entitled to find that the case was not made out for that period. As it has since transpired, she was not only entitled to reach that finding but right to do so.

DECISION

The Decision of First-tier Tribunal Judge Plumptre promulgated on 5 February 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed L K Smith Dated: 14 September 2021
Upper Tribunal Judge Smith

APPENDIX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00050/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams
On Thursday 27 May 2021

Decision sent

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR FRANCIS AWUAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Jaufarally, solicitor, Callistes solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

ADJOURNMENT DECISION AND DIRECTIONS

1. The Appellant challenges the decision of First-tier Tribunal Judge Plumptre promulgated on 5 February 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 16 December 2019 refusing to give him a permanent residence card as the former family member (spouse) of an EEA (French) national, Ms

Simone Gabriel. The Respondent's decision was made under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The Appellant is a national of Ghana. He married Ms Gabriel on 12 January 2008. An application was made on 7 January 2009 for a registration certificate and residence card. Ms Gabriel's application was refused on 1 December 2010 on the basis that the Respondent was not satisfied that she was exercising Treaty rights because the company for whom she claimed to work (Windnet Computing Ltd) did not exist. The Appellant's application was refused on the same basis. The decision gave rise to a right of appeal. I am not clear whether an appeal was brought at that stage. Mr Tufan did suggest in the course of his submissions that an appeal was brought and dismissed. The Appellant was granted a residence permit on 11 August 2011 valid to 11 August 2016. Mr Tufan informed me that this was in response to an application made after the failed appeal. I do not have any documents relating to that appeal. The marriage was brought to an end by a decree absolute on 27 July 2015. The Appellant claims that he separated from Ms Gabriel in June 2012 and lost contact with her thereafter. It is not clear to me how that could be the case given the divorce proceedings in 2015 but that fact is probably not material to the issues before me.

3. On 24 September 2020, the appeal came before First-tier Tribunal Judge Grey. The following part of his decision and directions are relevant to the issues before me:

> "… 2. This appeal concerns the Appellant's application for an EEA resident card under Regulation 10 of the Immigration (European Economic Area) Regulations 2016. The issue that remains to be determined in this appeal is whether, in accordance with Regulation 10(5)(a), the former wife of the appellant was a 'qualified person or an EEA national with a right of residence on the termination of the marriage' between the appellant and his former wife on 27.07.2015. The issue concerns whether the Appellant's former wife was exercising Treaty rights continuously until her divorce from the Appellant. <u>At this time the Appellant is not relying on Regulation 15 (right of permanent residence).</u>
>
> 3. The Appellant used a tracing agent to try and locate his former wife prior to bringing his application. The tracing agent was unable to locate her and stated, in March 2019, that they believed the former wife may have left the UK. The Appellant's representatives advised the Tribunal that the Appellant had exhausted all of his contacts in trying to locate her. I was satisfied that the Appellant had taken reasonable and appropriate steps to try to locate his ex-wife in order to obtain the evidence necessary to support his application and appeal.
>
> 4. In the refusal letter the Respondent states that enquiries were carried out of other government agencies on the Appellant's behalf. It further states that as a result of these enquiries the Respondent has been unable to show that the Appellant's ex-wife was exercising her

> treaty rights in the UK. The Respondent's representative at the CMRH was unsure as to whether any checks had been carried out.
>
> …
>
> **DIRECTIONS**
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> … 3. If she has not already done so, the Respondent should make best efforts to establish whether the Appellant's ex-wife was exercising EU free movement rights for the relevant period and should confirm by no later than **4pm on 16.10.2020** whether this has been done and, if information is not forthcoming or cannot be found, provide details of how and when efforts were made to obtain the information. If the Respondent is in possession of any information that could materially assist the Appellant with his appeal this should be disclosed in accordance with the duty set out in **Nimo (appeal: duty of disclosure) [2020] UKUT 00088(IAC)**.
>
> …"
>
> [bold in the original; underlining my emphasis]

4. By a statement dated 17 November 2020, the Respondent disclosed information relevant to the employment status of Ms Gabriel. The statement was signed by a G Sethukavalar who is a senior caseworker with the Home Office. The statement was based on information received from HMRC as contained in a witness statement of Mr Roger Drew. Mr Sethukavalar's statement did not annex Mr Drew's statement but instead provided the information contained therein. Mr Sethukavalar's statement contained a statement of truth. In broad summary, the information from HMRC was said to be that HMRC held no employment records for Ms Gabriel for the tax years 2013-14 to 2019-20. It was also said in the statement that there was no trace of a national insurance account under reference SJ953872B but there was a temporary reference used for HMRC purposes only.

5. Contrary to the Appellant's position at the CMRH before Judge Grey, the appeal proceeded on the sole basis that the Appellant was entitled to permanent residence under regulation 15 of the EEA Regulations. The Appellant argued that the Respondent had not provided information about Ms Gabriel's employment position between 2008 and 2013 and it should be inferred based on the grant of the residence permit that Ms Gabriel had worked for that period and the Appellant had therefore been the family member of a qualified person for a period of five years and was entitled to succeed. Judge Plumptre rejected that argument for reasons given at [13] to [17] of the Decision.

6. The Appellant appealed the Decision on two grounds as follows:

   Ground one: Judge Plumptre erred in rejecting the Appellant's submission that the enquiries made by the Respondent were inadequate. They were said to be insufficient based in part on the period covered by the enquiry but also in relation to the reference number on which the HMRC information was based.

Ground two: Judge Plumptre should not have given weight to Mr Sethukavalar's statement due to the failure by the Respondent to disclose the statement of Mr Drew.

7. Permission to appeal was granted by Upper Tribunal Judge Martin as a First-tier Tribunal Judge on 9 March 2021 in the following terms:

> "… 2. It is arguable that the Judge erred in concentrating her assessment on the years 2013 onwards, when, if the appellant's EEA national wife had worked in the UK for 5 years after they were married, then he is entitled to permanent residence. That involved the years 2007-2013.
>
> 3. It may be that the issue was determined in a previous appeal but the Decision and Reasons does not recite the findings of the previous Judge, but simply adopts them."

8. The reference to a previous appeal decision in Judge Martin's decision is to the determination of First-tier Tribunal Judge Mace promulgated on 3 July 2018 which appears at [AB/151-154] of the Appellant's bundle. Judge Mace found that there was no evidence that Ms Gabriel was exercising Treaty rights since 2011. That was however based on the Appellant's own evidence. There had been no request for the Home Office to make any enquiries.

9. The Respondent filed a Rule 24 Reply on 23 March 2021 which reads as follows so far as relevant:

> "… 3. The burden was on the appellant to show that his partner had been exercising treaty rights for the relevant period and it is clear from the determination that this burden had not been discharged. It is also clear that the judge was alive to the possibility that the partner had previously worked and they addressed this in para 16. On the basis of the evidence before the judge the appeal was bound to fail."

10. So it was that the appeal came before me to decide whether the Decision contains an error of law and, if so, whether to remake the decision or remit the appeal to the First-tier Tribunal to do so. The hearing before me was conducted via Microsoft Teams. There were no technical issues affecting the conduct of the hearing. The hearing was also attended remotely by the Appellant.

HEARING AND DECISION TO ADJOURN

11. The submissions made by Mr Jaufarally were largely focussed on ground one. In my view, he was right to concentrate on that point. The direction made by Judge Grey was not an Amos direction as such and therefore did not give the Respondent permission to disclose the witness statement made by HMRC. I accept Mr Tufan's submission that, whether rightly or wrongly, the Home Office had taken the view that it was not entitled to disclose the HMRC statement of Mr Drew and had therefore taken the step of including that information in a statement from a Home Office caseworker. As Mr Tufan submitted and I accept, there is nothing to

suggest that the information given by Mr Sethukavalar does not reflect what he was told by Mr Drew. The statement contains a statement of truth.

12. There may be more to the first ground. Mr Jaufarally made the point that there is no information about Ms Gabriel's employment history for the period January 2008 to April 2013. That would cover a period of just over five years. There is a suggestion that Ms Gabriel's employment history was in doubt certainly in December 2010 when the Appellant's residence card was refused but by August 2011 the Respondent had agreed to grant a residence card. The position prior to December 2010 is unclear.

13. As I pointed out in the course of submissions, though, the position could be put beyond doubt by formal enquiries of HMRC pursuant to an Amos direction. That would most likely be necessary prior to a re-making of the decision if an error of law were found and it would short circuit matters if that were done in the course of the error of law hearing. As I noted and I understood Mr Jaufarally to accept, if HMRC records showed that Ms Gabriel was not working during the period 2008-2013 (or any substantial part of it), that would undermine the Appellant's case. If, on the other hand, there were records showing that she had worked for all or most of that period, it may strengthen his position.

14. Although Mr Tufan was reluctant to agree to that course, it appeared to me to be the most sensible and pragmatic course. I therefore indicated that I would adjourn the appeal at error of law stage and would make an Amos direction and also a direction for disclosure of any documents held by either party in relation to the 2010 appeal (in case those cast any light on the employment issue at that point in time). For those reasons, I adjourned the hearing with directions as follows.

DECISION

The error of law hearing of this appeal is adjourned with the following directions.

DIRECTIONS

Amos direction

The Respondent is directed to exercise her powers under s.40 UK Borders Act 2007 to obtain from HM Revenue & Customs details of the employment or self-employment of the Appellant's ex-spouse:

Name: [~]

Born: [~]

Nationality: French

Last known addresses: [~], London;

[~], Milton Keynes

National Insurance No.: [~]

For the period: 12 January 2008 - 5 April 2013

Previous employment details: Windnet Computing Ltd; Intelligent Salary Services Ltd

Unique Tax Reference (UTR): unknown.

Other Directions

1. **Within 2 months from the date when this decision is sent** the Respondent shall file with the Tribunal and serve on the Appellant any documents and information obtained from HMRC pursuant to the foregoing direction.

2. **Within 2 months from the date when this decision is sent** the parties shall file with the Tribunal and serve on the other party any other information or documents within their possession or control relevant to the employment position of the Appellant's former spouse. Within that context the parties shall file and serve any information or documents held by them in relation to the appeal of the Appellant and his former spouse under reference IA/44566/2010.

3. **The error of law hearing in this appeal is to be relisted on the first available date after three months from the date when this decision is sent.**

4. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

5. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

6. Service on the Secretary of State may be to [email] and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed L K Smith Dated: 2 June 2021
Upper Tribunal Judge Smith