



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/42823/2013
IA/42824/2013
IA/42825/2013

THE IMMIGRATION ACTS

Heard at Field House

On 14 January 2015

**Decision & Reasons
Promulgated**

On 15 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS MARIA ELIANE FERNANDES DA SILVA (FIRST RESPONDENT)
MR KEVELIN FERNANDES DA SILVA (SECOND RESPONDENT)
MISS KAROLLYNE KETLEN SILVA (THIRD RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer

For the Respondents: Ms S Idelbi, Counsel instructed by Waterloo Legal
Advice Service

DECISION AND REASONS

1. The first respondent is a citizen of Brazil and her date of birth is 10 October 1973. The respondent Kevelin Fernandes Da Silva is the first

respondent's son. He is a citizen of Brazil and his date of birth is 15 March 1997. The respondent Karollyne Ketlen Silva is the first respondent's daughter. She is a citizen of Brazil and her date of birth is 8 July 1998. I shall refer to the first respondent as the appellant as she was before the First-tier Tribunal.

2. The appellant made an application for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 as confirmation of a retained right of residence in the UK following her divorce from an EEA national. Her application was refused by the Secretary of State in a decision dated 30 September 2013. The appellant submitted a decree absolute dated 9 August 2012 and it was accepted by the decision maker that her marriage was dissolved. It was also accepted that the marriage had lasted for three years and one of those the couple resided in the UK. It was also accepted that the EEA national was a qualified person at the point of the divorce. However, it was not accepted that the appellant was a worker in accordance with Regulation 10(6)(a) of the 2006 Regulations.
3. The appellant appealed against the decision and the appeal was allowed by Judge of the First-tier Tribunal Herbert in a decision that was promulgated on 8 October 2014 following a hearing on 30 September 2014. Judge Herbert allowed the appeal under the 2006 Regulations. He made material findings at paragraphs 15, 16 and 17 of the determination:
 - "15. At the hearing before me I had the benefit of the Appellant's bundle paginated pages 1 to 155. Within that bundle the submissions were outlined that there was overwhelming evidence that the Appellant did satisfy all the material requirements of Regulation 10(6) and 10(5) and therefore as clearly established he had a retained right of residence following the divorce.
 16. I also had the benefit of the bank statements and witness statement from the Appellants including P60s for the years 2007/2008, 2009/2010 for the tax year ending 2012 and 2013 and further payslips with the matching National Insurance number as the P60 of SJ749103D saying that at the time of the application there were payslips from Crystal Cleaning Services from 23 December 2012 through each month of February, March, April, May, June, July, August, September and October to November showing that the Appellant was working as claimed throughout that period.
 17. She was therefore exercising her treaty rights as if she were an EEA national at the time of the application contrary to the assertion made by the Respondent."
4. The Judge found that the first appellant was exercising treaty rights at the date of the application and that the application was made on 8 March 2013.
5. Permission to appeal was granted by Judge McDade on 27 November 2014. The grounds seeking permission assert that the Judge made a

material misdirection of law because he failed to apply the decision in **Bodhoo and Another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC)** where the Tribunal found that the relevant date for an in country appeal in respect of the 2006 Regulations is the date of the hearing. Thus the matter came before me.

6. I heard oral submissions from Mr Walker, who maintained that there is an error of law, but conceded that it was not material in the light of the credibility findings made by the Judge and the evidence contained in the appellant's bundle which was before the FtT and which establishes that the appellant was working as a self-employed cleaner at the date of the hearing before the FtT and thus satisfies the requirements of the 2006 Regulations.
7. The Judge made an error of law. The decision that the appellant was a worker at the date of the application is a lawful and sustainable decision but it was not the issue before him. The Judge should have considered the position at the date of the hearing. However, the Judge found the appellant to be credible and he accepted the evidence contained in the appellant's witness bundle. It is not clear from the determination whether the appellant gave oral evidence. She made a full and detailed witness statement which was before the FtT and her evidence is that she was employed at the date of the application. However, as a result of her immigration problem since the decision her employment has been suspended. She became self-employed on 1 December 2013 and since then she has worked as a self-employed cleaner and she started paying national insurance contributions directly. The appellant submitted documents in support of this from HMRC and letters from private individuals who employ her.
8. The Judge accepted the appellant's evidence which was that she was self-employed at the date of the hearing. She submitted evidence of this and it does not appear to have been challenged. In any event, Mr Walker conceded that in the light of this the error is not material and I agree with him. The appellant was at the relevant time (the date of the hearing before the FtT self-employed and satisfied the requirements of reg 10 (6) (a) of the 2006 Regulations. The decision of Judge Herbert is maintained.

No anonymity direction is made.

Signed Joanna McWilliam

Date 14 January 2015

Deputy Upper Tribunal Judge McWilliam