



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA268122014

**THE IMMIGRATION ACTS**

Heard at Newport  
On 4 May 2016

Decision & Reasons Promulgated  
On 25 May 2016

Before

UPPER TRIBUNAL JUDGE STOREY  
UPPER TRIBUNAL JUDGE GRUBB

Between

ALINE APARECIDA DA COSTA MARUCCI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Joseph instructed by Turpin & Miller Solicitors  
For the Respondent: Mr I Richards, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Brazil who was born on 29 October 1983. She entered the United Kingdom on 12 June 2008 with her husband, an Italian citizen, and was

granted six months' leave as a visitor. She subsequently made an application for a residence card as the family member of an EEA national exercising treaty rights in the UK under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (the "EEA Regulations"). On 8 May 2009 the appellant was issued with a residence card valid until 8 May 2014.

2. On 3 May 2014, the appellant made an application for a permanent residence card as the family member of an EEA national exercising treaty rights in the UK. She relied upon reg 15(1)(b) of the EEA Regulations. Her claim was that she had been resident in the UK in accordance with the EEA Regulations for a continuous period of five years. Although she and her husband had separated in December 2012, she claimed that for a five year period between 12 June 2008 and 12 June 2013 he had been exercising treaty rights as a worker in the UK and that, therefore, as his family member she had, for that period of time, a right to reside under the reg 14(2) despite their separation (see Diatta v Land Berlin (C267/83) [1985] ECR 567 and PM (EEA - spouse - "residing with") Turkey [2011] UKUT 89 (IAC)).
3. On 16 June 2014, the Secretary of State refused her application for a permanent residence card.

### The Appeal

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 3 November 2014, Judge Harries dismissed the appellant's appeal. She was not satisfied, on the evidence, that the appellant had established that her separated husband had been exercising treaty rights for a five year period and so, as a consequence, she had failed to establish that she had resided in the UK in accordance with the reg 14(2) for a continuous period of five years to acquire a right of permanent residence under reg 15(1)(b) of the EEA Regulations.
5. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds.
6. First, the judge had failed properly to consider all the evidence including the documentary evidence and also the oral evidence of the appellant which (it was claimed) established that the appellant's separated husband had, in fact, been working for a five year period between June 2008 and June 2013 such that the appellant had established her permanent right of residence.
7. Secondly, it was argued that the Tribunal had erred in law by failing to make, or consider making, a direction that the respondent should exercise her power under s.40 of the UK Borders Act 2007 to seek necessary information concerning the employment of the appellant's separated husband from HM Revenue & Customs or from the employer of the appellant's former husband.
8. Permission to appeal was initially refused by the First-tier Tribunal but, on renewal, on 27 April 2015 the Upper Tribunal (UTJ Lindsley) granted permission on all grounds.

9. On 7 May 2015, the Secretary of State filed a response under Rule 24 seeking to uphold the judge's decision on the basis that the judge had properly considered all the evidence and that it was not appropriate for the judge to issue a direction to the respondent to exercise her power under s.40 of the UK Borders Act 2007.
10. Thus, the appeal came before us.

### **The Submissions**

11. Before us, Mr Joseph, who represented the appellant, essentially relied upon the grounds of appeal. He submitted that the judge had erred in law by failing properly to consider the documentary evidence submitted. He submitted that the judge had been wrong in para 19 of her determination to state that there were no contracts of employment in respect of the appellant's husband. He submitted that there were such documents in the extensive bundle of documents submitted for the First-tier Tribunal hearing. Further, Mr Joseph submitted that the judge had been wrong in para 20 to state that there was "no supporting evidence by way of documents" to show that the appellant's husband had been employed beyond December 2012. Mr Joseph directed us to a letter dated 29 April 2014 from HM Revenue & Customs which sets out the employment details (including employee pay and tax) for the tax years 2008-09, 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. He submitted that it was clear for the tax year ending 5 April 2013 that the appellant's husband had earned £28,056 and that this was commensurate with his employment for the full tax year including the period January 2013 to April 2013.
12. Secondly, Mr Joseph acknowledged that there was no documentary evidence supporting the employment of the appellant's husband beyond 5 April 2013 before the First-tier Judge but, he submitted, the appellant's oral evidence was that she had been told by a friend in May 2014 that her husband continued to work in the same place (which on the documentary evidence would be for a company run by Mr J M Freeth called Thamesdown Recycling). Mr Joseph submitted that the judge had erred in law by failing to make any finding in respect of the appellant's evidence which, if the judge accepted it, when added to the documentary evidence supporting her former husband's employment to 4 April 2013, resulted in a continuous period of employment up to at least 12 June 2013 which would be sufficient for the appellant to succeed in her appeal.
13. When we raised with Mr Joseph the ground relying upon s.40 of the UK Borders Act 2007, he indicated that he would only rely on that ground if we did not accept the error identified in his submissions as to the judge's assessment of the documentary and oral evidence. As a consequence, we proceeded to hear submissions from Mr Richards, on behalf of the Secretary of State, in respect of the judge's assessment of the evidence and, as will be clear shortly, given the view we took at the hearing, it was unnecessary to consider any submission in respect of s.40 of the UK Borders Act 2007.
14. Mr Richards, who represented the Secretary of State, accepted that the judge was wrong to state in para 20 that there was no supporting evidence for the employment

of the appellant's former husband between January and April 2013. However, he submitted that error was not material as it did not, in itself, establish continuous employment by him for the requisite five years under the EEA Regulations. That required evidence up to at least June 2013.

15. As regards the appellant's oral evidence, Mr Richards submitted that the appellant had no personal knowledge of her husband's employment but had merely been told by a friend. The appellant had no direct contact with her husband; it was merely what she believed to be the position as regards his continuing employment.
16. Mr Richards submitted that the judge had not erred in law by failing to take into account all the evidence and, on the basis of it, reach a sustainable finding that the appellant had not established the requisite five years' employment by her husband between June 2008 and June 2013.

### **Error of Law**

17. The applicable law in the EEA Regulations is not contentious. The appellant claimed a permanent right of residence by virtue of reg 15(1)(b) of the EEA Regulations on the basis that she had resided in the UK as a

"family member of an EEA national ... who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years ...".

18. In order to establish that residence in accordance with the EEA Regulations, in effect, under reg 14(2) the appellant is required to establish that she resided in the UK as the "family member of a qualified person in the UK", namely that her husband was a "worker" for the purposes of EU law. Given the appellant's case, she was required to establish that he was a "worker" for the period 12 June 2008 to 12 June 2013. The fact they were separated for some of the time is irrelevant (see, Diatta and PM).
19. Judge Harries dealt with the documentary evidence at paras 18-20 as follows:

"18. The appellant gave details of her spouse's employment in the United Kingdom on her application form for periods from 10<sup>th</sup> July 2008 to 5<sup>th</sup> September 2008; from 27<sup>th</sup> July 2009 to 23<sup>rd</sup> August 2009; from 3<sup>rd</sup> October 2008 to 6<sup>th</sup> April 2010; from 8<sup>th</sup> September 2008 to 19<sup>th</sup> August 2011 and from 19<sup>th</sup> August 2011 to the date of application, namely 3<sup>rd</sup> May 2014. The appellant has submitted a bundle of documents including a schedule of earnings provided by H M Revenue & Customs for the appellant's spouse showing earnings for the tax years 2009, 2010, 2011, 2012 and 2013.

19. I accept that there is evidence that the appellant's husband had taxable income in the years shown on H M Revenue & Customs documents but this does not show continuity of employment. The appellant submitted several packs of various documents for the years from 2008 to 2013 at the hearing. These documents included numerous payslips for the appellant and her husband and contracts of employment for the appellant. There are, however, no contracts of employment for the appellant's husband.

20. I have examined each payslip submitted and there are a substantial number to show monthly income for the appellant's husband for 4 years from 2009 to 2012 inclusive. There is, however, no evidence of employment or income before June 2008 and there is only one payslip for 2013, that being for the month of January 2013. Thereafter the appellant accepts that she cannot access the necessary evidence in the light of her estrangement from her husband. There is accordingly no supporting evidence by way of documents to show the appellant to be correct in her belief that her husband's employment continued beyond December 2012 and is current".
20. Mr Richards accepted that the HM Revenue & Customs letter dated 29 April 2014 (at pages 68-69) did show that the appellant's husband had been employed until the end of the tax year 5 April 2013 and so the judge was wrong to state at the end of para 20 that there was no supporting evidence to show his employment beyond December 2012. We agree that the judge was in error in that respect. We do not set out in detail the letter of 29 April 2014 but, for this purpose, it suffices to say that it clearly supports the employment of the appellant's husband up to 5 April 2013.
21. At para 20, the judge appears to accept that the appellant's husband was employed from June 2008. That is partially supported by the entry in the Revenue letter for the tax year 2008-09 to the extent that it identifies an employment with "Field Commercial Recruitment Limited" ending on 5 September 2008 prior to the appellant's husband moving on to employment from 8 September 2008 with "Storm Recruitment Limited". However, as Mr Joseph submitted to us, the bundle of documents before the judge included pay slips issued by "Field Commercial Recruitment Limited", the earliest of which is dated "20.06.08" in respect of the appellant's husband showing gross pay of £346.50 for the previous week but, in addition, showing "gross pay to date" of £456.75". It is clear, therefore, that the appellant's husband was receiving income for work through "Field Commercial Recruitment Limited" prior to the week of 13-20 June 2008.
22. The judge does not specifically refer to this pay slip but, in our judgment, it clearly supports what she says in para 20 of her determination that, in effect, the evidence relating to the employment and income of the appellant's husband exists in the documents from June 2008, in fact, from a date entirely consistent with the appellant's case that her husband worked from 12 June 2008.
23. Of course, the documentary evidence did not support the appellant's claim that her husband was employed beyond 5 April 2013. Her oral evidence was, however, that she had been told by a friend in May 2014 that at that date (and therefore in the relevant period April 2013-June 2013), her husband continued to work for Mr Freeth. The appellant provided no supporting documentation. As will become clear shortly, that documentation has subsequently been submitted to the Tribunal.
24. In his submissions, Mr Richards accepted that an individual's oral evidence (if accepted by a judge) could be sufficient to "plug the gap" left by documentary evidence. We agree. Here, however, the judge made no finding in relation to the appellant's evidence that she had been told in May 2014 by a friend that her separated husband continued to work for Mr Freeth.

25. Mr Richards placed considerable weight on the fact that the appellant had no personal knowledge of this but only, in the words of the judge, “believes” that her husband lives and works in the same place. In our judgment, that the appellant’s evidence was, in effect, hearsay only went to the weight which the judge could, in the context of all the evidence, give to that evidence. It did not absolve the judge from making a finding whether or not she accepted the appellant’s evidence and, if she did, whether it was sufficient to establish that her separated husband had been working in the UK beyond 4 April 2013. We acknowledge that the judge was not bound to accept the appellant’s evidence but, we do note, that the judge does not at any point in her determination call into question the appellant’s credibility. There would, even if the appellant’s evidence were accepted, remain the issue of what weight to give to it since it was hearsay. However, in the absence of any finding it is not possible to say what view the judge took, or would take, of that evidence. That, in our judgment, amounted to an error of law in reaching her adverse findings.
26. Although Mr Joseph placed some reliance upon the judge failing to note that the documents did contain contracts of employment for the appellant’s husband, and there clearly was such a contract effective from 8 August 2011 in relation to his employment by Mr Freeth, we do not consider that this adds anything to the appellant’s case that the judge erred in law. In our judgment, the judge clearly erred in law; first in failing properly to take into account the evidence from the Revenue as to the employment of the appellant’s husband up to 5 April 2013; and secondly, in failing to make any finding in relation to the appellant’s evidence which was capable of establishing, if accepted, that her husband continued to be employed after that date for a sufficient period to complete the five years’ continuous employment upon which the appellant relied for her permanent right of residence.
27. For those reasons, the judge’s decision to dismiss the appellant’s appeal involved the making of an error of law. Her adverse factual finding cannot stand and we set the decision aside.
28. In the light of that decision, which we announced at the end of the submissions, we heard no submissions in relation to s.40 of the UK Borders Act 2007.

### **Re-making the Decision**

29. Mr Richards accepted that there was now evidence before the Upper Tribunal that the appellant’s separated husband continued to be employed by Mr Freeth for the tax year ending 5 April 2014. At pages 9-10 of the bundle a letter from the Revenue dated 29 January 2015 sets out that the appellant’s husband was employed by Mr Freeth during that tax year with a gross pay of £25,843. In our judgment, that evidence clearly establishes on a balance of probabilities that the appellant’s separated husband continued to work in the UK from 5 April 2013 until, at least, 5 April 2014.
30. Mr Richards did not seek to submit that the appellant’s appeal should not, therefore, now succeed on its merits.

31. In our judgment, he was correct to do so. The documentary evidence, in particular the evidence of employment and income set out now in the Revenue's letter for 29 January 2015 (together with the pay slips, in particular the pay slip relating to employment in June 2008), establish on a balance of probabilities that the appellant's now separated husband was a "worker" for the period 12 June 2008 to 12 June 2013 relied upon by the appellant to establish that she has been resident in the UK in accordance with the EEA Regulations for a continuous period of five years as a family member of an EEA national exercising treaty rights.
32. Mr Richards did not suggest that there were any relevant breaks in the continuity of the employment of the appellant's husband. Nothing in the evidence leads us to doubt that the appellant's husband was a "worker" under EU law either because he was actually working or was a jobseeker or was seeking work "between jobs".
33. For these reasons, we are satisfied on a balance of probabilities that the appellant has established a permanent right of residence under reg 15(1)(b) as a family member of an EEA national who has resided in the UK for a continuous period of five years in accordance with the EEA Regulations.

### **Decision**

34. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. We set the decision aside.
35. We remake the decision allowing the appellant's appeal against the respondent's decision refusing to issue a permanent residence card under the EEA Regulations.

Signed

A Grubb  
Judge of the Upper Tribunal  
Date 25<sup>th</sup> May 2016

### **TO THE RESPONDENT** **FEE AWARD**

We have allowed the appeal and to the extent that a fee has been paid or is payable, we make a fee award of any fee which has been paid or may be payable.

Signed

A Grubb  
Judge of the Upper Tribunal  
Date 25<sup>th</sup> May 2016