



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01158/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 17 August 2017

Decision & Reasons promulgated
On 19 September 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

BICEITA MELICIA DUDLEY
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Awal Solicitor

For the Respondent: Mr S Kotas Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Gurung-Thapa promulgated on 14 November 2016 in which the Judge dismissed the appellant's appeal against the refusal of the respondent to issue a Residence Card in recognition of the appellant's right to remain in the United Kingdom on the basis of a retained right of residence.
2. The Judge noted that it was submitted by Mr Awal during the hearing that the appellant seeks to rely on being a family member who has retained a right of residence under Regulation 10(5) of the 2006 Regulations. Mr Awal stated this is a stand-alone regulation and that the appellant can rely on the EEA national

- exercising his treaty rights on the termination of the marriage or she can rely on her own right. The appellant was not working at the termination of the marriage but the EEA national was and as evidence of this he relied upon the payment received by HMRC (pages 37-38 of the appellant's bundle).
3. The Judge records that Mr Awal submitted the appellant is not seeking to rely on Regulation 10(6) because she would have to show that she was in continuous employment and there was no alternative reliance on any of the 2006 Regulations.
 4. Having considered the evidence Judge notes that her reading of the Regulations is that the appellant has to satisfy the requirements set out in Regulation 10(5) and (6) as Regulation 10(5)(c) clearly states that the person has to satisfy the conditions in paragraph 6.
 5. The appellant maintained that she satisfies the requirements because she has produced an HMRC payment confirmation and a note from MDM Accountancy dated 18 March 2015 addressed to the EEA national attaching payment confirmation of £100 from HMRC. The Judge, however, at [22] finds "I do not find that this is satisfactory evidence to establish that the EEA national was exercising his treaty rights on the termination of the marriage. Further, the appellant also cannot satisfy the requirement in her own right as she was not in employment on termination of the marriage given the fact that she was laid off from her employment in January 2015".
 6. In the alternative, the Judge considers at [23 - 25] the position as if EEA national was exercising treaty rights on termination of the marriage thereby satisfying the requirements of Regulation 10(5)(b) by way of considering whether the appellant met the requirement of regulation 10(5)(d)(i). The Judge found she was satisfied that prior to the initiation of the divorce proceedings the marriage had lasted for at least three years and that the parties to the marriage had resided in the UK for at least one year during its duration.
 7. Judge then considers regulation 10(6)(a) and expresses a view that the requirements of this regulation have to be met at the date of divorce as this is when the matrimonial relationship between the EEA national and non-EEA national ceases and the non-EEA national is given the opportunity to retain a right of residence in his or her own right. The Judge refers to the decision of the Court of Appeal in *Amos & Anor v SSHD [2011] EWCA Civ 552* in which it was held that Regulation 10(6)(a) requires the non-EEA national to be economically active. The Judge notes the appellant's own evidence was that she was not economically active at the date of divorce so her last period of work was in January 2015 leading to it being concluded the appellant was not able to meet the requirement of Regulation 10(6)(a).
 8. The Judge thereafter considered regulation 15(1)(f) and found the appellant could not satisfy this requirement as she had not established she was a worker, self-employed, or self-sufficient person at the date of divorce and thereafter until she returned to work in December 2015.
 9. The appellant sought permission to appeal which was granted by another judge of the First-tier tribunal. The operative part of the grant being in the following terms:

3. In her decision the judge at paragraph 25 noted that the Appellant was not economically active at the date of the divorce, her last period of work was January 2015, therefore she failed to establish she was economically active and did not [meet] the requirements of Regulation 10 (6) (a). The judge may have not taken a structured approach to the necessary fact-finding exercise and misdirected herself in relation to the case of Amos and Anor [2011] EWCA Civ 552. In the form of material error that the Appellant, as opposed to the EEA partner, should have been working at the time of divorce per paragraph 10. It appears that the EEA former partner also may have been exercising treaty rights as the Appellant submitted evidence from a four-part self-assessment payment HMRC and a letter from MDM Accountancy dated back on 18 March 2015 confirming that. Amos denotes there is no requirement for the Appellant to produce evidence of working and the former partner duly exercising treaty rights and in all these respects the judge may have fallen into error by not addressing such salient points in accordance with the law and the Regulations.

Error of law

10. It is not disputed that the appellant, a citizen of Jamaica, was married to an EEA national from whom she was divorced on 30 March 2015. The application for a Residence Card, on the basis of a retained right of residence upon divorce or right of permanent residence, was rejected by the Secretary of State who specifically noted in the refusal:
 - You have not provided evidence of your sponsors treaty rights around the date of your divorce on 30 March 2015 the most recent evidence you have provided is dated 5 April 2014, nearly a year prior to the date of your divorce. You have failed to provide the necessary information, it is deemed that you have not met the criteria as set out in regulation 10(5)(b) of the regulations.
 - To satisfy the criteria of regulation 10(6) (in relation to 15(1)(f)) you would need to provide evidence of your being a worker, self-employed person or a self-sufficient person following the date of your divorce. Whilst it can be accepted that you have been employed from 31 July 2010 until 30 January 2015, you have provided no evidence of your being a worker, self-employed person or a self-sufficient person after the date of your divorce on 30 March 2015. As such you have failed to meet the criteria as required by regulation 10(6) in relation to 15(1)(f).
 - Due to your providing no evidence of your former spouse is treaty rights around the date of your divorce and no evidence of your being a worker, self-employed person or a self-sufficient person after the date of your divorce, it is deemed that you have failed to evidence your residence in the United Kingdom in accordance with the Regulations for a continuous period of five years. Therefore it has been decided to refuse the confirmation that you seek with reference to regulation 15(1)(f) in relation to 10(5) and 10(6) of the Immigration (European Economic Area) Regulations 2006.
11. The appellant asserts that there was evidence before the Judge. It is not disputed that material was provided but in [22] the Judge did not find that the evidence was sufficient to establish that the EEA national was exercising treaty rights at the date of termination of the marriage as noted above.
12. The appellant asserts that she provided all the evidence that was available which by nature was historical as she could not get updated material, although it was at accepted and admitted that no application been made to the First-tier

- Tribunal to see if the EEA national could be found or to seek his attendance or the production of relevant documents for the purposes of the hearing.
13. In the case of *Amos [2011] EWCA Civ 552* Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether notwithstanding the divorce the right had been retained could be determined. It was found there is no obligation upon the Secretary of State to assist a third country national in obtaining missing information about the divorced EEA national in light of the essentially adversarial nature of immigration appeals, confirming that the burden of proving entitlement rests upon the person so asserting. The court also found that the requirements of the Citizens Directive was that at all times while residing in the UK until their divorce the spouse had to be a worker or self-employed, the marriage had to have lasted for at least three years, including one year in the UK and they had to show that they were workers, self-employed or otherwise satisfy the penultimate paragraph of Article 13(2) of the Citizen's Directive. The two concerns in relation to this appeal outlined by the Judge is that the evidence did not satisfy the First-tier Tribunal that the EEA national was a worker or self-employed person up until the date of divorce or that the appellant had shown that she was a worker or self-employed or otherwise at that time.
 14. The appellant asserts that evidence was provided of the partner's self-employment status as evidenced by payments from HMRC in a letter from an accountant confirming the same.
 15. Within the bundle is notification given to HMRC of the EEA national becoming self-employed and registering for National Insurance contributions indicating the EEA national set up a house maintenance business on 11 February 2011 as a sole trader. Self-assessment statements dated 28 June 2012, 11 September 2013, 24 June 2013 were provided with the application together with documents relating to the payment of self-employed class 2 National Insurance contributions. Those documents do not cover the relevant period.
 16. The Judge noted the evidence from the appellant that her husband had left the matrimonial home in the middle of 2014, 14 June 2014, and asked how she had managed to get hold of self-assessment payment receipt from HMRC if she claims to have no contact with him. The response was that the appellant knew the accountant the EEA national used and that when he left he was still working and that the last thing she had was that receipt. The appellant had herself been laid off as a care assistant in January 2015 and remained unemployed until December 2015. The Judge clearly took careful note of the evidence provided and noted that the note from MDM Accountancy dated 18 March 2015 addressed to the EEA national attached payment confirmation of £100 from HMRC. The evidence indicates a number of penalties and fines being imposed upon the EEA national for late service/filing of tax returns and the return of the payment from HMRC without clearly defining the purpose for which it is made is arguably insufficient to establish that the EEA national was exercising treaty rights. This does not make out arguable legal error in the primary finding of the Judge that the appellant had not discharged the necessary burden of proof upon her.

17. The assertion that requiring the appellant to provide evidence of the former partners exercise of treaty rights was unlawful is not arguably made out. The Court of Appeal clearly set out the necessary legal test in *Amos*. The Upper Tribunal decision relied upon by the appellant, *HS [2011] UKUT 165*, found that
 1. Where the Secretary of State revokes a residence card before the expiry of its validity it falls on her to justify such revocation.
 2. Regulation 10 of Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that: a genuine marriage has lasted three years and the couple have spent one year together in the United Kingdom and that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member.
18. It is the second point upon which the Judge found the appellant failed to produce sufficient evidence.
19. The alleged misdirection of the decision of the Court of Appeal in *Amos* is not arguably made out. Judgment in that case was handed down on 12 May 2011. The Judge arguably assess the former partners evidence relating to the exercise of treaty rights which was not found to discharge the required burden. Whilst that evidence may have shown the EEA national was not working at the date of divorce, which it is arguable was the only conclusion that could be arrived at, there was insufficient evidence to support a finding that even though there was no evidence of actual working at that time or exercise of treaty rights as a self-employed person, the EEA national retained his status as a worker as per the decision in *HS*.
20. No arguable legal error material to the decision to dismiss the appeal is made out on the evidence provided to the Judge and to this Tribunal. The determination shall stand.

Decision

21. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal made no anonymity order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Judge of the Upper Tribunal Hanson

Dated the 15 September 2017