



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

Appeal Number: IA/46531/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 May 2015**

**Decision & Reasons
Promulgated
On 27 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS SIONEIA SIRENE RAABE PINTO
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr Tarlow, Specialist Appeals Team
For the Respondent/Claimant: In person, with Mr Fleming assisting as a
McKenzie Friend.

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision of the Secretary of State to revoke her five year EEA residence card, and against the separate decision of the Secretary of State to refuse to issue

her with a permanent residence card. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Brazil. On 25 August 2007 she got married in Brazil to Hermes Edwardo Jung, a German national. The claimant subsequently entered the United Kingdom with her husband, and made a successful application for a five-year residence card which was issued to her as the family member of an EEA national exercising treaty rights here. The card was issued to her on 9 October 2009.
3. On 19 April 2013 a judge at Wandsworth County Court granted the claimant a decree nisi, and on 26 June 2013 the court issued a decree absolute, thereby dissolving the marriage.
4. In the meantime, on 15 May 2013 the claimant applied for a permanent residence card as confirmation of her right to reside in the United Kingdom on a permanent basis under the Immigration (EEA) Regulations 2006.
5. On 21 October 2013 the Home Office issued a notice of immigration decision revoking the claimant's residence card under Regulation 20(2). This was on the ground that she had ceased to be the family member of a qualified person and no longer had a right of residence in the United Kingdom or the right to hold a residence card confirming such a right.
6. On 26 October 2013 the respondent issued a notice of immigration decision refusing her application for a permanent residence card.
7. The Reasons for Refusal Letter dated 17 October 2013 seems to have been directed to the second immigration decision, rather than the first. In order to qualify for a retained right of residence following her divorce from an EEA national, in accordance with Regulation 10(5) of the Regulations 2006 the following information was required:
 - Evidence that the former EEA spouse was exercising freedom of movement rights in the United Kingdom at the time of divorce.
 - Evidence that the marriage lasted for at least three years and that she and her former spouse resided in the United Kingdom for at least one year during their marriage.
 - Evidence that she was currently in employment, self-employment or economically self-sufficient as if she were an EEA national.
8. In addition, as her application was for permanent residence, she had to demonstrate that she had resided in accordance with the Regulations for a continuous five-year period which would mean that her EEA national former spouse needed to have exercised free movement rights up to the point of divorce; and that she had been employed, self-employed or self-sufficient since the divorce. Collectively, the evidence had to cover a

continuous five-year period to meet the requirement of Regulation 15(1)(f).

9. Among other things, she had not provided evidence that the EEA national was a qualified person and that she was therefore residing in accordance with the Regulations at the point of divorce. So it had been decided to refuse to issue the confirmation she sought under Regulation 15(1)(f) with reference to Regulations 10(5) and 10(6).

The Hearing Before, and the Decision of, the First-tier Tribunal

10. The claimant's appeal came before Judge Afako sitting at Taylor House in the First-tier Tribunal on 17 September 2014. The appellant appeared in person, with Mr Fleming acting as a McKenzie friend.

11. In his subsequent decision, the judge found that the claimant had entered the United Kingdom on 16 September 2007 as the spouse of Mr Jung, a German national who was already in this country apparently exercising treaty rights. Her husband's pay slips had been produced to reflect the fact that he was working in the period 2008 to 2009 and beyond. The evidence from HMRC dated 3 April 2013 showed that Mr Jung was collecting a job seekers allowance from 29 January 2008 and worked for two different employers in that tax year. The last record the HMRC had for his employment was 1 February 2010.

12. With reference to Regulation 10(5), although the marriage had broken down in an earlier period, it was only terminated in June last year:

[B]y that time, and certainly by the time of the hearing, the claimant had already been residing in this country for more than five years and for most of that time she was married. She therefore meets the requirements of paragraph 10(5)(d).

13. The judge said that whatever the questions about her ex-husband's whereabouts or activities in the UK, it seemed to him that as at the date of the hearing the claimant had retained her right of residence in accordance with Regulation 15(1)(f), as she had been residing in this country for the last five years and was married for more than one year of that period.
14. Applying **Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 165 (IAC)**, there was no justification or proper process observed in the revocation of her residence card, which should be reinstated. It also seemed to him that the claimant met the requirements for permanent residence.

The Application for Permission to Appeal

15. The Secretary of State applied for permission to appeal on the ground that the judge had materially erred in law in not making a finding as to whether her former husband had acquired permanent residence at the point of divorce, and it seemed from the facts set out at paragraph [3] of his

decision that the evidence of his exercising treaty rights did not go beyond 2010. So, on the evidence before him, it was not a finding open to him in any event.

The Grant of Permission to Appeal

16. On 24 November 2014 First-tier Tribunal Judge Shimmin granted the Secretary of State permission to appeal on the grounds raised.

The Hearing in the Upper Tribunal

17. At the hearing before me, Mr Tarlow relied on **Amos [2011] EWCA Civ 552**. The appellant through Mr Fleming relied on the opinion of the Advocate General in **Bott**, case C-244/13 delivered on 14 May 2014 and on **NA (Pakistan) [2014] EWCA Civ 995** in which the Court of Appeal at paragraph [20] posed the following question for the Court of Justice of the European Union to decide:

Must a third country national ex-spouse of a union citizen be able to show that their former spouse was exercising treaty rights in the host member state at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC?

18. As Mr Fleming elaborated, in essence the case for the claimant was that the Regulations 2006 were incompatible with the Directive; and that, upon the correct construction of the Directive, the claimant did not need to show that her husband was exercising treaty rights at the date of divorce in order to retain a right of residence under European Community law.

Reasons for Finding an Error of Law

19. Regulation 10 sets out the criteria which must be fulfilled for a family member to retain the right of residence.
20. Regulation 10(5) provides that a person satisfies the conditions in this paragraph if -
 - (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
 - (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
 - (c) he satisfies the condition in paragraph 6; and
 - (d) either -
 - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration ...

21. Judge Afako found that the claimant was able to bring herself within Regulation 10(5)(d)(i). and there is no challenge by the Secretary of State to this finding.
22. There is also no challenge to Judge Afako's finding that the claimant satisfies the condition in Regulation 10(6).
23. However, the judge clearly failed to make a finding on the following questions relating to compliance with Regulations 10(5) (a) and 10(5)(b):
 - (a) whether the claimant ceased to be a family member of a *qualified person* on the termination of the marriage; and/or
 - (b) whether the claimant ceased to be the family member of an EEA national who had a *permanent right of residence* on the termination of the marriage; and/or
 - (c) whether the claimant was residing in the United Kingdom "in accordance with these Regulations" at the date of the termination.
24. The judge purported to allow the appeal under the Regulations 2006. He did not base his decision on the proposition that Regulation 10(5) was unlawful because it was incompatible with the Directive, and that the claimant's appeal succeeded through a direct application of the Directive.
25. It follows that the judge has not given adequate reasons for allowing the claimant's appeal.

The Remaking of the Decision

26. There were two appellants in **Amos**, the second of whose material history is similar to that of the claimant's in this case. The second appellant entered the UK in February 2002 and on 12 June 2003 she married a French national. She was granted a right of residence in the UK as a family member of an EEA national for the period 27 August 2003 to 21 August 2008. Their marriage broke down, and the couple separated when Mr Batman moved out of the matrimonial home in late 2007. She started divorce proceedings in July 2008 and was granted a decree absolute on 8 December 2008. She had worked throughout her time in the UK. Her evidence on appeal was that when she met her husband he worked as a chef. She did not know whether he had continued to work after their separation, and in particular she did not know whether he was working at the date of their divorce, or even whether he was still living in the UK at that date.
27. Upper Tribunal Judge Moulden dismissed her appeal because she did not satisfy the requirements of Regulation 10(5)(b), because she had not shown that her husband was exercising treaty rights (i.e. working) at the date of her divorce.

28. The Court of Appeal upheld the decision of Upper Tribunal Judge Moulden on appeal. Giving the leading judgment of the court, Stanley Burnton LJ held at paragraph [30] that the Regulations were consistent with the terms of the Citizenship Directive (Directive 2004/38/EC) on the rights of citizens of the Union to reside freely within the territory of the member states. He further held that if a non-EEA national met the the conditions contained in Regulation 10(5), including the condition that the EEA national spouse was a qualified person at the date of divorce, then after five years' continuous residence in the UK the non-EEA national would be entitled to a permanent right of residence under Regulation 15(1)(f). In the circumstances, he did not consider that a reference to the Court of Justice was necessary or appropriate.
29. In **NA (Pakistan)** a differently constituted Court of Appeal found at paragraph 21(3) that **Amos** was not binding authority for the proposition that the Regulations have correctly transposed the Directive. There IS no express requirement in Article 13(2) of the Directive that there should be proof that the former spouse was exercising treaty rights in the host member state at the time of divorce. The issue raised in **Amos** was dealt with by way of a concession.
30. The fact that **Amos** had proceeded by way of a concession was one of the reasons why the Court of Appeal in **NA (Pakistan)** decided to request a preliminary ruling from the Court of Justice of the European Union on the proper interpretation of Article 13(2). Another reason was that neither party submitted that the answer to the issue raised in the appeal was *acte clair*.
31. In the light of the Court of Appeal in **NA (Pakistan)** requesting a preliminary ruling from the Court of Justice of the European Union on the proper interpretation of Article 13(2), there is clearly a distinct possibility that Community law will be clarified in the claimant's favour. But, as is recognised by the Court of Appeal at paragraph 21(2) of **NA (Pakistan)**, at present our national law imposes the requirement that an ex-spouse of a union citizen, who is himself/herself a third country national, must be able to show that their former spouse was exercising treaty rights in the host member state at the time of their divorce.
32. I must apply our national law as it stands today, and so I find that the claimant's appeal fails under the Regulations 2006. She has not shown by reference to the Regulations that the Secretary of State was wrong to revoke her existing residence card, or wrong to refuse to issue her with a permanent residence card.
33. The claimant through Mr Fleming raised the fact that she was in limbo until the Court of Justice gave a ruling on the reference. Her passport had been retained by the Home Office, and her ability to carry on a normal life is hampered by not being able to produce any official documentation with regard to her immigration status. Mr Tarlow was sympathetic, but said he was not in a position to help. He did not demur from my suggestion that

the way forward was for the claimant to make written representations to the Home Office.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal under the Regulations 2006 is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson

