Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26173/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd May 2016	**On 10th May 2016**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MS ENUNICE MBABAZI KICONCO
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Uganda born on 26th July 1982. She married Mr Sam Tarsis Mukwaya, a Swedish citizen born on 1st January 1966, in Sweden on 19th April 2006. In April 2006 she was granted a residence permit in Sweden. Her husband had already travelled to the UK for work in the UK by this stage. She arrived to join him on 12th May 2006. The appellant was granted a residence permit as the spouse of Mr Mukwaya

in the UK on 18th October 2006. In February 2007 the couple separated. Mr Mukwaya subsequently travelled to Sweden and seemingly tried to divorce the appellant on 13th May 2008, although an order from Senior District Judge Waller on 3rd April 2012 states that the divorce was not recognised in the UK as the appellant was not served with the document. It is now accepted by the respondent that the appellant remains married to Mr Mukwaya. It is not known when Mr Mukwaya left the UK but HMRC records record him working here until February 2012.

2. On 3rd June 2014 the respondent refused the appellant a residence permit on the basis of a retained right of residence in accordance with Regulations, 6, 7 & 10 of the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations).

3. The appellant's appeal against the decision was dismissed under the EEA Regulations by First-tier Tribunal Judge James in a determination promulgated on the 24th March 2015. However I found that the First-tier Tribunal had erred in law and set aside the decision in its entirety in my decision promulgated on 17th November 2015. My reasons are set out in that decision which is appended at Annex A.

4. The matter came before me remake the appeal. The issue which remains to be determined is whether the appellant is entitled to a residence permit or permanent residence on the basis that she is married to an EEA national who is and/or was exercising Treaty rights as a qualified person in the UK in accordance either with Regulations 6 and 7 of the Immigration (EEA) Regulations 2006 or Regulation 15 of the Immigration (EEA) Regulations 2006.

Evidence – Remaking

5. The respondent provided evidence to the Tribunal together with a witness statement from Mr John Richards of the HMRC that the appellant's husband, Mr Sam Mukwaya, was employed in the UK and paid tax from March 2008 to February 2012 as an employed person, employed by Arriva Plc. There are no records for self assessment tax submissions or of the payment of tax on the basis of employment from 2012 onwards or prior to this date.

6. The appellant relied upon her statement that prior to his work with Arriva Plc Mr Mukwaya had worked as a night club manager for Pier One in Dalston. She referred to the fact that she had provided a payslip from 2006 to support this (which showed tax and national insurance being paid). Mr Clarke also identified in the respondent's file a letter from Pier One Night Club dated 20th May 2006 which stated that Mr Mukwaya had been an assistant manager with them from 2nd October 2005 and continued to be so employed. The appellant added in oral evidence that Mr Mukwaya had worked Thursday, Friday, Saturday and Sunday evenings and for sometime during the days sorting out things such as the cleaners. She had met Mr Lule who wrote the original letter from Pier One held on the respondent's file. Mr Mukwaya had done his bus

driving training during the day time whilst working for Pier One at night. He had also done casual work for a care agency during the days until she had obtained employment as they needed more money. The appellant was certain that Mr Mukwaya continued to hold the employment with Pier One up until the point when she separated from him in February 2007. She is also certain he continued with this employment until he went to work for Arriva after their separation. She knew Mr Mukwaya continued his employment there after she separated from him as a friend of hers knew Mr Williams who was another manager at Pier One. She was aware that Mr Mukwaya started his bus work after they separated, and thought it was in approximately 2007 but she was not certain.

Submissions – Remaking

7. Mr Clarke submitted for the respondent that the evidence did not show that the appellant's husband had exercised Treaty rights for a continuous period of five years. The HMRC evidence clearly only showed a period of work of 3 years and 11 months. This did not suffice to show the appellant was entitled to permanent residence under Regulation 15 of the Immigration (EEA) Regulations 2006. He understood that the checks done by the HMRC were ones which should have recorded all tax paid by a person with Mr Mukwaya's national insurance number.

8. The appellant submitted that she was certain that Mr Mukwaya had been employed from May 2006 when she joined him in the UK until his employment with Arriva Plc. She therefore believed she was entitled to permanent residence.

Conclusions – Remaking

9. I am satisfied that the appellant is married to a Swedish citizen, Mr Sam Mukwaya and has been married to him since April 2006.

10. The appellant cannot currently qualify to remain on the basis of her marriage to Mr Mukwaya under Regulations 6 and 7 of the Immigration (EEA) Regulations 2006 as there is no evidence he is currently a qualified person in the UK. The appellant does not know whether he currently lives and works in the UK and there is no other evidence going to this issue.

11. The only question which remains is whether she acquired a right of permanent residence as a result of her marriage to Mr Mukwaya and his work during the period May 2006 to February 2012. Regulation 15 (1) (b) of the Immigration (EEA) Regulations 2006 means that a family member of an EEA national who has resided in the UK with the EEA national in accordance with these Regulations for a continuous period of five years shall acquire a right to reside in the UK permanently.

12. It is clearly the case that Mr Mukwaya was a qualified person for the period March 2008 to February 2012 as the HMRC evidence sets out

that he worked for Arriva Plc during this period. That evidence is also clear that no tax or national insurance was paid for any work by Mr Mukwaya prior to March 2008.

13. The appellant has however given coherent and detailed evidence about Mr Mukwaya's work prior to this for Pier One Night Club during the period May 2006 to March 2008, which is also supported by an original letter from that entity (found in the respondent's file) and one pay slip for May 2006. It was this evidence that the respondent found satisfactory to grant her original EU dependent residence permit. I find the appellant to be a careful and credible witness who is able to describe her husband's work during this period in some detail. She evidently does not give evidence as to whether Pier One Night Club paid tax or national insurance as they should have done however as this is not a matter within her knowledge. I find on the balance of probabilities, on the evidence before me, that Mr Mukwaya worked for Pier One Night Club as claimed by the appellant but that company did not pay tax and national insurance as represented on the payslip. I find that this work was genuine and effective despite the failure of Mr Mukwaya's employer to deal properly with HMRC.

14. I am therefore also satisfied on the balance of probabilities that Mr Mukwaya worked during the period May 2006 to March 2008 and thus was a qualified person during this period, as he was during the period March 2008 to February 2012, making a totally period of five years and nine months as a qualified person. I am also satisfied that the appellant has not left the UK for a period of two consecutive years or more since acquiring permanent residence, and thus that she is entitled to a right of permanent residence under Regulation 15(1) of Immigration (EEA) Regulations 2006.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal in its entirety.

3. I remake the appeal by allowing it under the Immigration (EEA) Regulations 2006.

Signed: Fiona Lindsley

Date: 4th May 2016

Upper Tribunal Judge Lindsley

Annex A

DECISION AND REASONS

Introduction

15. The appellant is a citizen of Uganda born on 26th July 1982. She married Mr Sam Tarsis Mukwaya, a Swedish citizen born on 1st January 1966, in Sweden on 19th April 2006. In April 2006 she was granted a residence permit in Sweden. She and her husband then travelled to the UK for work, arriving on 12th May 2006. The appellant was granted a residence permit as the spouse of Mr Mukwaya in the UK on 18th October 2006. In February 2007 the couple separated. Mr Mukwaya subsequently returned to Sweden and seemingly tried to divorce the appellant on 13th May 2008, although the appellant contests the validity of this divorce. Proceedings were then commenced in the Principal Registry of the Family Division on 15th February 2012 whereby the appellant challenged the validity of this divorce and obtained an order from Senior District Judge Waller on 3rd April 2012 stating that the divorce was not recognised in the UK as the appellant was not served with the document. On 3rd June 2014 the respondent refused the appellant a residence permit on the basis of a retained right of residence in accordance with Regulations, 6, 7 & 10 of the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations).

16. The appellant's appeal against the decision was dismissed under the EEA Regulations by First-tier Tribunal Judge James in a determination promulgated on the 24th March 2015. Judge James found on the evidence before him that the appellant had not been married to Mr Mukwaya for three years; had not shown that there had been domestic violence within the marriage; had not shown Mr Mukwaya had obtained permanent residence; and had not shown he was still living or working in the UK. He also found that the couple were now divorced. He accepted that they had lived as a married couple and worked for a year prior to this divorce and the appellant was currently a worker but this alone did not suffice to meet the Regulations.

17. Permission to appeal was granted by First-tier Tribunal Judge Grimmett on 13th August 2015 on the basis that it was arguable that the First-tier

judge had erred in law in not facilitating a procedurally fair hearing as he had arguably confused Mr Mayanja (the MacKenzie's friend) with Mr Adewale (an ex boyfriend of the appellant) and had thus arguable not allowed the Mackenzie's friend to play a proper role in the hearing, leaving the appellant at a disadvantage in presenting her case.

18. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions

19. The grounds of appeal are very hard to understand. However I understand them to contend firstly that there was procedural unfairness due to the confusion over the identity of the MacKenzie's friend and not allowing the MacKenzie's friend a proper role. Secondly that the appeal ought to have been adjourned, and failure to do so was also procedurally unfair. Thirdly that it was wrong to find on the balance of probabilities that the appellant was divorced. Fourthly that Article 8 ECHR ought to have been considered.

20. Mr Jafar made lucid submissions which pointed to the fact that the appellant had shown signs of being very confused by the proceedings according to the decision at paragraphs 7, 15 and 34. He argued that the appellant's credibility had been infected by the confusion over the identity of the MacKenzie's friend at paragraph 8 and 39 when the First-tier Tribunal had not been able to understand why the MacKenzie's friend would not give evidence, thinking him to be the ex-boyfriend of the appellant who had been willing to do this in 2011 and who ought to have known about her relationship with husband. This was a material error as the appellant's evidence as to whether she was married and had experienced domestic violence from her husband was rejected because she was not seen as a credible witness.

21. Mr Jafar submitted that in addition the decision that the appellant was divorced failed to properly consider the order of the Principal Registry of the Family Division dated 3rd April 2012 which states that the Swedish divorce is not recognised in the UK, and the conclusions of Judge Dawson in the decision of the Upper Tribunal promulgated on 23rd October 2012. These documents meant that the decision of the First-tier Tribunal was irrational on this point.

22. Mr Melvin conceded that there had been a confusion about the identity of the MacKenzie's friend but argued that the confusion was not material.

Conclusions – Error of Law

23. I am satisfied that Judge James misunderstood the role of the appellant's friend before the Tribunal. It was not right to inform him and the appellant that he could only take notes. There is evidence from the

decision of the First-tier Tribunal that this put the appellant at a disadvantage as at paragraph 34 the appellant's ability to present her case is termed as "garbled" and at paragraph 7 she is described as looking "puzzled". As was said in RK (entitlement to represent s.84) Bangladesh [2011] UKUT 00409 conclusion (4): "Accordingly, where a family friend was seeking (otherwise than in the course of a business) to represent the appellant at a hearing, the Immigration Judge had no right to restrict the friend's involvement to that of a Mackenzie Friend on the basis that he was not legally qualified (see also HH (Sponsor as representative) Serbia [2008]UKAIT 00063"

24. I am also satisfied that there was a confusion in the identity of the MacKenzie friend which for the reasons put by Mr Jafar has made the credibility findings against the appellant unsound.

25. I am also satisfied that the decision that the appellant was divorced from her husband was irrational as it was contrary to the evidence of the decision of Upper Judge Dawson from 2012 and an order of the Principal Registry of the Family Division dated 3rd April 2012. It is also notable that respondent's own refusal decision dated 3rd June 2014, against which the appellant appealed stated, that she had not shown she was divorced from her husband at page 2 of 4.

26. In these circumstances I find that the First-tier Tribunal has erred in law and it is appropriate to set aside the decision of the First-tier Tribunal in its entirety.

Re-making

27. The parties initial said they thought the matter should return to the First-tier Tribunal for re-hearing however I found that it was appropriate for the remaking hearing to be before the Upper Tribunal given the delays in hearing dates in the First-tier Tribunal and the narrow point that was now to be decided.

28. It was agreed that the appellant wished simply to argue that her appeal should be allowed on the basis that she was married to an EEA national who was exercising Treaty rights as a qualified person in the UK. Mr Melvin agreed that the respondent did not argue that the appellant was divorced from her Swedish husband, and thus accepted that she was still married to him.

29. Mr Jafar applied for an adjournment of the re-making hearing as he wished to pursue the request made in advance of the hearing in writing by the appellant for directions that the respondent request information regarding the appellant's husband's work from HMRC and provide this to the Tribunal. He argued that it was appropriate for me to make such a direction as the appellant had set out in her witness statements that she had been a victim of domestic violence, and he also called evidence from the appellant in which she explained that she did not wish to locate her husband as she did not want him to know where she lived as he might then harass or even hurt her. She had provided evidence in

her witness statements about where he lived and worked in 2011. She did not know what he had done since this time, and had no mutual friends or family who could give her this information. Mr Jafar submitted that it was appropriate to make this request when it was clear that the appellant's husband was trying to subvert her entitlement to EEA rights by improperly obtaining a Swedish divorce and sending the document to the Home Office. He submitted that he had previously experienced this information being provided without difficulty.

30. Mr Melvin opposed the adjournment on the basis that whilst I could make such a direction in his experience the HMRC would not agree to give the records about the appellant's husband's work as there were no exceptional reasons for them to do so and in his experience this process had taken up to nine months.

31. I found that in all the circumstances it was in the interests of justice to adjourn the matter and make the requested direction, but the case would be listed for a for-mention hearing in two months time to check progress with the request by the respondent to HMRC.

Decision:

4. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

5. I set aside the decision of the First-tier Tribunal in its entirety.

6. The remaking hearing is adjourned, with a for mention hearing to be listed in 2 months time.

Directions:

1. The Secretary of State will forthwith use her best endeavours to obtain tax and or national insurance records from HMRC or other government agencies relating to Mr Sam Tarsis Mukwaya, citizen of Sweden, DoB 1/1/1966 whose last known employer was the Arriva Bus Company in London and whose last known address was [ ].
2. Any evidence so obtained should be filed with the Tribunal and served on the appellant forthwith.
3. If the appellant obtains any evidence regarding her husband's work or other exercise of Treaty rights in the UK this is to be filed with the Tribunal and served on the respondent forthwith.

Signed: Fiona Lindsley

Date: 11th November 2015

Upper Tribunal Judge Lindsley

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