



IAC-AH-LEM/DP/BW-V3

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

Appeal Number: IA/50603/2013

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 7th December 2015 and
3rd February 2016**

**Decision & Reasons Promulgated
On 17th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**BALWINDER SINGH
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R de Mello of Counsel

For the Respondent: 7th December 2015: Mr D Mills,
Senior Home Office Presenting Officer

3rd February 2016: Mrs R Pettersen,
Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant has appealed against the decision of Judge Petherbridge of the First-tier Tribunal (the FTT) promulgated on 3rd September 2014.

2. The Appellant is a male Indian citizen born 30th April 1974 who on 27th August 2013 applied for a residence card as confirmation of a right to reside in the United Kingdom.
3. The application was made on the basis that the Appellant married an EEA national on 5th April 2004. The EEA national is Maria Josepha Vargis Flores to whom I shall refer as Ms Flores. She is a Spanish citizen.
4. It was contended that both the Appellant and Ms Flores had been employed and they resided together until December 2010 when they separated, and Ms Flores returned to Spain. The Appellant then instituted divorce proceedings, and relied upon regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations) claiming that he had retained a right of residence following divorce from Ms Flores.
5. The application was refused on 18th November 2013 with reference to regulation 10(5) and (6) of the 2006 regulations. In giving reasons for refusal the Respondent accepted that the Appellant had been married to an EEA national, and that the marriage had been dissolved. It was not accepted that Ms Flores was exercising treaty rights at the time of divorce, therefore the application was refused.
6. The Appellant appealed, and the appeal was heard by the FTT on 4th July 2014. After hearing evidence from the Appellant and oral submissions from both parties, the FTT reserved its decision and thereafter noted there had been no reference to either Amos [2011] EWCA Civ 552 or Ahmed [2013] UKUT 00089 (IAC) and therefore issued directions inviting the parties to make written submissions as to whether it was agreed that this case law should be followed, and if not, reasons should be given.
7. No response was received from the Respondent, but written submissions were made by Mr de Mello on behalf of the Appellant on 15th August 2014.
8. Having considered those submissions, the FTT decided that Amos and Ahmed should be followed and made the following finding at paragraph 33;

“It therefore follows that I must find that to acquire a retained right of residence under both the Directive and under the Regulations, it is necessary for an ex-spouse to show that his union citizen (EEA national spouse) was exercising Treaty rights in the United Kingdom at the time of the divorce.”
9. Because it was accepted that Ms Flores was in Spain at the time of the divorce, the FTT dismissed the appeal, notwithstanding the arguments made on behalf of the Appellant, that it was not necessary for a former EEA national spouse to be exercising treaty rights in the United Kingdom at the time of the divorce.
10. Following the dismissal of the appeal, the Appellant applied for permission to appeal to the Upper Tribunal. In brief summary the grounds repeated the written submissions dated 15th August 2014 that had been made to the FTT, and placed reliance upon NA v Secretary of State for the Home Department [2014] EWCA Civ 995 which indicated, inter alia, that Amos was not binding authority for the proposition that the regulations had correctly transposed the Directive, and requested a preliminary ruling from the Court of Justice of the European Union (the

CJEU) on the proper interpretation of Article 13(2) of Directive 2004/38/EC (the Directive). The question posed for consideration by the CJEU in NA was;

“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?”

11. It was contended that the FTT had erred by not referring two questions to the CJEU, the first of which was the question referred by the Court of Appeal in NA, and the second in the following terms;

“Can a third country national ex-spouse of a union citizen retain a right of residence under Article 13(2) during the period he separates from his ex-spouse and the termination of his marriage on the promulgation of the divorce absolute?”

12. It was contended that the FTT had been wrong to follow Amos and Ahmed, and wrong to find that in order to retain a right of residence under Article 13 of the Directive, it is necessary for the ex-spouse to be in the UK exercising treaty rights at the time of the divorce.

13. Permission to appeal was granted by Upper Tribunal Judge Martin in the following terms:

“It is arguable as asserted in the grounds that the judge erred in finding that the Appellant needed to show that his spouse was exercising Treaty rights at the date of the divorce when the Appellant had acquired a permanent right of residence before the marriage broke down.”

Error of Law

14. On 27th February 2015 I heard submissions from both parties in relation to error of law. Mr de Mello relied upon the grounds contained within the application for permission to appeal, and it was pointed out that before the FTT, the Appellant had relied upon both Article 13 and Article 16 of the Directive, which relates to acquisition of permanent residence. I was asked to accept that the FTT had erred in its findings at paragraphs 30 and 33 of the decision, and had failed to consider NA, which stated that Amos was not binding.
15. The Respondent was represented by Mr Smart who argued that it was incorrect for the grant of permission to refer to the Appellant having acquired a right of permanent residence and the FTT had been correct to find that this was not the case. Mr Smart pointed out that the Appellant’s application form indicated that he had been absent from the United Kingdom between February 2009 and September 2009, and he had in August 2010 applied for permanent residence, which had been refused because the evidence supplied did not show that the EEA national had exercised treaty rights. Mr Smart submitted a copy of the reasons for refusal letter dated 22nd December 2010 confirming the reason for refusing permanent residence. Mr Smart had no submissions to make in relation to the FTT’s failure to consider NA.
16. By way of response Mr de Mello submitted that the points made by Mr Smart were relevant to Article 16 of the Directive, but not Article 13 which related to retained

rights of residence, and that failure by the FTT to consider NA was a material error of law.

17. I concluded that the FTT erred in not considering the relevance of NA which had not been published at the date of hearing before the FTT, but was published on 17th July 2014, and which was referred to in the written submissions dated 15th August 2014 made on the Appellant's behalf.
18. The Court of Appeal in NA considered the issue that was before the FTT, and considered an appeal against the Upper Tribunal decision in Ahmed. In my view NA was clearly relevant, and in paragraph 21(3) it was decided that Amos is not binding authority for the proposition that the 2006 Regulations have correctly transposed the Directive.
19. Although NA does not overrule the Upper Tribunal decision in Ahmed, it does cast doubt as to whether the findings of the Upper Tribunal are correct in law. The Court of Appeal decided in NA that the answer to the issue raised in the appeal was not acte clair and therefore there needed to be a reference to the CJEU.
20. In my view the FTT erred by unequivocally finding that Amos and Ahmed should be followed, without considering or analysing the decision in NA. There is no reference to NA in the FTT decision, which amounts to a material error of law.
21. The decision of the FTT was therefore set aside.

Re-making the Decision

22. There followed a hearing on 16th September 2015 before a panel comprising Upper Tribunal Judge Kebede and Deputy Upper Tribunal Judge M A Hall. It was accepted by Mr de Mello that both questions which the Appellant requested be referred to the CJEU had been resolved by the decision of the CJEU in Singh and Others [2015] 3WLR 1311. Accordingly it was accepted on behalf of the Appellant that he could not meet the requirements of regulation 10(5) of the 2006 regulations and that the only remaining issue in the appeal was in regard to regulation 15 of the 2006 regulations.
23. It was accepted that the Appellant had raised the issue of permanent residence before the FTT, and he claimed that he had acquired a permanent right of residence under regulation 15(1)(b) prior to the breakdown of his marriage. It was accepted by all parties that this was not a matter addressed or resolved by the FTT, and which remained to be determined.
24. Directions were made that the Appellant must file a skeleton argument setting out the Appellant's case as regards the acquisition of permanent residence under regulation 15, and the Respondent must file an argument in reply.

The Upper Tribunal Hearing 7th December 2015

Preliminary Issues

25. Mr Mills had not received the Appellant's skeleton argument which had been received by the Tribunal on 11th November 2015, nor had Mr Mills received the

Appellant's second witness statement dated 7th December 2015. There was therefore no skeleton argument submitted on behalf of the Respondent. Mr Mills indicated that he had considered the skeleton argument and witness statement and was ready to proceed. Mr de Mello was also ready to proceed and called the Appellant to give evidence.

The Appellant's Evidence

26. No interpreter had been requested, and Mr de Mello indicated that he did not believe an interpreter was needed. The Appellant adopted the contents of his witness statement dated 7th December 2015. He was not asked any further questions by Mr de Mello.
27. The second witness statement may be summarised as follows.
28. The Appellant commenced a relationship with Ms Flores in Spain some time in the middle of 2003. They lived together in Barcelona with Ms Flores' family before marriage. They decided to live and work in the UK.
29. The Appellant left Ms Flores in Spain and came to the UK in the first week of February 2004. He was joined by Ms Flores in the second week of February and they started living together on 16th February 2004. The first witness statement made by the Appellant which stated that Ms Flores came to the UK in March or April 2004 was a mistake.
30. In February 2004 Ms Flores was offered a job with R K Foods to commence in April 2004 and the Appellant was offered employment with the same company.
31. Ms Flores was to work as a cleaner and the Appellant as a factory packer and both were to act as caretakers. R K Foods gave them accommodation above the factory and paid the utility bills.
32. The Appellant and Ms Flores married at Sandwell Register Office on 5th April 2004 and in that month both moved to live above the factory.
33. In 2008 the Appellant changed employment and commenced work for Kane Foods. Between February 2004 and April 2004 Ms Flores was a job seeker. Between April 2004 and the middle of February or March 2009 both the Appellant and Ms Flores were in employment.
34. At approximately the end of March 2009 the Appellant and Ms Flores decided to go to Spain for two weeks' holiday to see her family. Ms Flores had paid leave. Both intended to return to England and carry on work.
35. When in Spain Ms Flores started to have severe headaches and had to stay in Spain and the Appellant stayed with her. Ms Flores' employers continued to pay her wages whilst she was in Spain and both the Appellant and Ms Flores returned to the UK in early September 2009.
36. In 2010 Ms Flores went back to Spain for medical treatment but retained her employment at R K Foods. Problems in the marriage started in December 2010, and the couple started living apart in March 2011. Ms Flores worked at R K Foods until

late 2011 and the Appellant believes that she left the UK permanently at the end of 2011 or beginning of 2012. He started divorce proceedings after she left the UK.

37. Mr Mills started to ask questions by way of cross-examination but it became clear to me that the Appellant did not understand what was being asked of him and that he did in fact require an interpreter. I therefore decided it was necessary to adjourn the hearing so that a Punjabi interpreter could attend.

The Tribunal Hearing 3rd February 2016

Preliminary Issues

38. It was agreed the questions asked by Mr Mills in cross-examination at the previous hearing would be disregarded because of language difficulties. The hearing would therefore commence with cross-examination by Mrs Pettersen. Both representatives indicated that they were ready to proceed.

The Appellant's Evidence

39. I established that there was no difficulty in communication between the Appellant and interpreter in Punjabi. Mrs Pettersen pointed out that the Appellant in his application form had indicated that he left the UK between February 2009 and September 2009 because a family member was ill. In his most recent witness statement he had stated that at the end of March 2009 he and his wife decided to go to Spain for two weeks' holiday to see her family. He said that he had made a mistake in completing his application form. The Appellant explained that Ms Flores became ill once they had arrived in Spain. She received her wages while she was in Spain from her employer, and these were paid in cash when she returned to the UK.
40. When asked why the Appellant had referred to a family member being ill when completing his application form, rather than explaining that it was his wife, the Appellant stated that his wife's father had been unwell, and the Appellant became unwell after they had arrived in Spain.

The Respondent's Submissions

41. In summary Mrs Pettersen contended that the Appellant had become the family member of an EEA national on 5th April 2004 when he married Ms Flores. They had not resided together for a continuous period of five years in accordance with the regulations. The Appellant and Ms Flores were absent from the UK between February and September 2009. They had not acquired five years' lawful residence before leaving the UK.
42. Mrs Pettersen submitted credibility issues were raised in relation to Ms Flores being apparently paid in cash while she was in Spain in 2009, and there was no mention of Ms Flores being ill, when the Appellant declared his absence from the UK in his application form. Mrs Pettersen stated that it was not accepted that Ms Flores was a qualified person as defined by regulation 6 for a five-year period.
43. I was asked to note that there was a discrepancy as to when the Appellant left the UK, as the skeleton argument indicated that the Appellant believed that he left the

UK in late February/early March 2009, whereas his witness statement indicated that he left in late March 2009.

44. Mrs Pettersen's submission was that the Appellant had not acquired permanent residence when he left the UK in February or March 2009, and because his absence was in excess of six months, the "clock had stopped". Mrs Pettersen submitted that the Appellant did not satisfy regulation 15(1)(b) of the 2006 regulations.

The Appellant's Submissions

45. Mr de Mello relied upon the skeleton argument dated 5th October 2015. As to the time when the Appellant left the UK I was referred to page 109 of the Appellant's bundle, that being a Nationwide account, which showed that the Appellant had withdrawn money on 14th February 2009 which indicated that he was still in the UK at that date.
46. Mr de Mello submitted that the Appellant had explained in his oral evidence that when reference was made in the application form to a family member being ill, that was Ms Flores' father, and Ms Flores became ill having arrived in Spain which is why they stayed in excess of six months. Both had intended to return to the UK.
47. As to when Ms Flores came to the United Kingdom I was asked to accept that a tenancy agreement at page 74 in the Appellant's bundle confirmed that she and the Appellant started living together on 16th February 2004.
48. Mr de Mello submitted that the evidence proved that Ms Flores came to the UK as a job seeker and the clock started running from her date of entry into the UK. From February 2004 to 5th April 2004 the Appellant was a family member of Ms Flores as they were in a durable relationship prior to marriage. From 16th February 2004 to 16th February 2009 the couple resided legally for a continuous period of five years. At the point of the Appellant's departure from the UK in February or early March 2009 the Appellant had already acquired permanent residence. Therefore his absence for six or seven months did not deprive him of permanent residence.
49. During this period the Appellant had worked and supported Ms Flores, who in turn was self-sufficient on the basis of his earnings.
50. In the alternative Mr de Mello made submissions in relation to the period between 5th April 2004 and 5th April 2009 contending that the Appellant and Ms Flores did not intend to depart from the UK permanently when they left in February or March 2009. Initially they intended to stay in Spain for two weeks, but remained because Ms Flores was diagnosed with a serious illness. They had still however retained their residence in the UK and Ms Flores had retained her job. Therefore even though the Appellant and Ms Flores were in Spain for part of the period, they acquired permanent residence in April 2009 because they had retained their residence and occupation in the UK.
51. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

52. In re-making the decision I have taken into account the documentary evidence supplied to the Tribunal. This includes the Respondent's bundle with Annexes A-C and the reasons for refusal letter dated 18th November 2013, and the Appellant's bundle comprising 210 pages. I have also taken into account submissions made on behalf of the Appellant dated 15th August 2014, the Appellant's witness statement dated 7th December 2015, and the skeleton argument prepared on behalf of the Appellant dated 5th October 2015.
53. I have taken into account the Appellant's oral evidence, and the submissions made by both representatives.
54. The initial application made by the Appellant was for a residence card based upon retained rights of residence. It was accepted on the Appellant's behalf that his appeal could not succeed on that basis, therefore the issue that I have to consider relates to Article 16 of Directive 2004/38/EC (the Directive) and regulation 15 of the 2006 regulations. For ease of reference I set out below Article 16 the Directive;
1. Union citizens who have resided legally for a continuous period of five years in the host member state shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
 2. Paragraph 1 shall apply also to family members who are not nationals of a member state and have legally resided with the Union citizen in the host member state for a continuous period of five years.
 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another member state or a third country.
 4. Once acquired, the right of permanent residence shall be lost only through absence from the host member state for a period exceeding two consecutive years.
55. I also set out below regulation 15 in part;
- (1) The following persons shall acquire the right to reside in the United Kingdom permanently -
 - (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
 - (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

56. I find as a fact that the Appellant and Ms Flores married in the UK on 5th April 2004. Thereafter they lived together until they encountered problems in their marriage and these problems became evident in December 2010, and the couple started living separately in March 2011. Ms Flores returned to Spain at the end of 2011 or the beginning of 2012. The last wage slip in Ms Flores' name issued by R K Food Products is dated 16th December 2011.
57. After Ms Flores left the UK the Appellant commenced divorce proceedings, in April 2012, and the marriage was dissolved by way of a decree absolute on 3rd July 2013.
58. In order for the Appellant to acquire permanent residence it must be proved that Ms Flores was exercising treaty rights in this country. The burden of proof is on the Appellant and the standard is a balance of probability.
59. It must therefore be proved that Ms Flores was a qualified person as defined by regulation 6 of the 2006 regulations, in that she must have been a job seeker, a worker, a self-employed person, a self-sufficient person, or a student.
60. The Appellant made an application for permanent residence on 10th August 2010, and the application was refused on 22nd December 2010, because the Respondent did not accept the Appellant had provided evidence to prove that Ms Flores was a qualified person.
61. I do not find that the Appellant has proved that Ms Flores entered the United Kingdom and commenced living with him on 16th February 2004. I note that at page 74 of the Appellant's bundle there is a tenancy agreement that relates to 134 High Street, West Bromwich, in the joint names of the Appellant and Ms Flores. I do not find that this document without more proves that they commenced living together on that date. It is for the Appellant to prove that a document on which he seeks to rely can be relied upon, and I must consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. I have considered the evidence in the round, and note that the signature on the tenancy agreement said to be that of Ms Flores, differs significantly from the signature on a different tenancy agreement at page 75 of the bundle. The other tenancy agreement relates to 9 Queens Head Road, Birmingham and is dated 12th April 2004. I am not a handwriting expert, but take into account the different signatures, and I also take into account the initial witness statement made by the Appellant dated 13th June 2014, which he relied upon before the FTT. In that statement the Appellant confirmed that he entered the UK in February 2004 from Spain where he had lived for a period of six months. He described that after his arrival in the UK his relationship with Ms Flores continued and they spoke regularly on the telephone, and after a couple of months she decided that she wanted to come and live with him in the UK. No satisfactory explanation has been given by the Appellant as to why he would state that he arrived in the UK in February 2004, a couple of months before Ms Flores, if that was not accurate.
62. I therefore conclude that Ms Flores arrived in the UK after the Appellant, and shortly after her arrival married. I am not satisfied that the couple lived together in a durable relationship prior to marriage, and I therefore conclude that the Appellant

became the family member of an EEA citizen when he married Ms Flores on 5th April 2004.

63. I accept that Ms Flores worked for R K Food and that she commenced that employment in April 2004. The first wage slip produced is dated 30th April 2004 which indicates that Ms Flores began employment in mid-April 2004. Further wage slips indicate she was employed until 28th May 2004.
64. No further wages slips are produced until 22nd May 2009, and those wage slips continue to 24th July 2009. It is the Appellant's case that between March 2009 and September 2009 he and Ms Flores were in Spain.
65. I place weight on a letter dated 13th March 2010 from the proprietor of R K Food Products Limited which states that Ms Flores worked for his company on "an occasional basis for over five years." The letter explains that when additional staff were required, Ms Flores would be asked to work. The maximum wages she received in any one year in that period was £2,485. She was paid in cash.
66. No evidence has been submitted to prove that Ms Flores has been granted permanent residence in the UK. There is no evidence to show that she registered as a job seeker. She has not contended that she was either a student or self-employed. It is contended that she was a qualified person because she was a worker, but I do not find that this has been proved on a balance of probabilities. In the period between April 2004 and February or March 2009 when Ms Flores left the UK for a period in excess of six months, the only satisfactory evidence of employment are wages slips covering a period of approximately one month in 2004, and two months in 2009, when Ms Vargis was not actually working but was in Spain. A letter from her employer describes her as an occasional worker.
67. No satisfactory information has been produced from HMRC that relates to Ms Flores. There are no P60 tax forms, the only letter from HMRC is dated 13th January 2010 stating that she has a tax code.
68. There is reference in the skeleton argument at paragraph 12 to the Appellant supporting Ms Flores, and she being self-sufficient. If she was self-sufficient she would need to have comprehensive sickness insurance cover and there is no evidence that any such cover has ever existed.
69. I therefore conclude that insufficient evidence has been provided to prove that Ms Flores has been a qualified person for a continuous period of five years, and therefore it has not been proved that the Appellant has resided with her in accordance with the 2006 regulations for a continuous period of five years. The Appellant had not acquired permanent residence when he left the UK in February or March 2009. I do not find the Appellant left the UK in late March 2009 as contended in his latest witness statement. The Appellant stated in his application form that he left the UK in February 2009 because of the illness of a family member. I accept that he returned to the UK in September 2009, and therefore was outside the United Kingdom for a period in excess of six months.

70. There is no satisfactory evidence to prove that Ms Flores commenced exercising treaty rights upon her return to the UK in September 2009. There is evidence that she commenced work again for R K Food Products in September 2011, but that is some considerable time after she and the Appellant ceased residing together.
71. Therefore the appeal must be dismissed with reference to the Directive, and the 2006 regulations.
72. This is not an appeal where reliance was placed upon Article 8 of the 1950 Convention, and as no notice under section 120 of the 2002 Act has been served, and no removal decision has been made, Amirteymour [2015] UKUT 00466 (IAC) confirms that a human rights challenge cannot be brought in an appeal under the 2006 Regulations.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I substitute a fresh decision. The appeal is dismissed.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no application for anonymity to the Upper Tribunal and I see no need to make an anonymity order.

Signed
Deputy Upper Tribunal Judge M A Hall

Date 8th February 2016

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed
Deputy Upper Tribunal Judge M A Hall

Date 8th February 2016