



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28103/2015

THE IMMIGRATION ACTS

Heard at Field House  
On: 30 May 2017

Decision & Reasons Promulgated  
On: 24 October 2017

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHPETIM MALAJ

Respondent

Representation:

For the Appellant: Mr E. Wilford, of counsel

For the Respondent: Ms A. Fijiwala, Senior Home Office Presenting Officer

DECISION

1. Regulation 10(5) of the Immigration (EEA) Regulations 2006 ("the EEA Regs") provides, *inter alia*, that, in order to qualify for a retained right of residence following divorce, a non EEA national must establish that he or she was residing in the United Kingdom in accordance with the regulations at the date of the termination of the marriage. For this appellant, as will generally be the case, that is said by the respondent to mean that he must show that his former wife was exercising Treaty rights in the UK at the date of the termination of the marriage, which is, in legal terminology, the date upon which the decree absolute was issued.
2. The question to be resolved in this appeal is whether that is in fact what is required by the EEA Regs and, if so, whether that requirement, set out in regulation 10(5), is also a requirement of Article 13(2) of Directive 2003/38/EC ("the Directive"), which the EEA Regs seek to transpose into domestic law. In short, the appellant contends that there is no such requirement in the Directive and that what he has to show in

order to be entitled, under Article 13(2) is that his EEA spouse was exercising Treaty rights at the date of the commencement of the divorce proceedings.

3. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge Farmer who, by a determination promulgated on 22 July 2016, allowed the appeal of Mr Malaj against a decision made on 4 August 2015 to refuse his application for recognition of a permanent right of residence on the basis of a retained right of residence as the former spouse of an EEA national.
4. The only ground of challenge being pursued by the Secretary of State is to the conclusion of the judge that the relevant date for assessing whether the EEA national spouse was exercising Treaty rights was the date upon which divorce proceedings were initiated, it being the contention of the Secretary of State that in order to succeed in this appeal, the appellant must establish that his former spouse was exercising Treaty rights as at the date of the divorce. Thus, the appeal is concerned with a question of law and there is no need to embark upon any discussion of the particular facts. Therefore, no oral evidence was required or called to inform the determination of the appeal to the Upper Tribunal.
5. The starting point might be taken as recital 15 in the preamble to the Directive:

Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

6. The Directive sought to give effect to that ambition, so far as it related to spouses of Union citizens whose marriages end in divorce, through the provisions of Article 13 which provides:

**Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership**

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

- (a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
- (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
- (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
- (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4)."

Such family members shall retain their right of residence exclusively on personal basis.

7. The reference in Article 13(1) to Article 7 is to the requirements to be met by Union citizens for a right of residence for more than three months. To qualify, a Union citizen must demonstrate that they:
- Are workers or self-employed in the host member state; or
  - Have sufficient resources not to become a burden on the host state and have comprehensive sickness insurance; or
  - Are enrolled for study at a qualifying establishment, as well as having sufficient resources so as not to become a burden and has comprehensive sickness insurance; or
  - Are a family member accompanying or joining a Union citizen satisfying these requirements.

This particular provision may prove to be significant in the discussion that follows. That is because it illustrates that the Directive contemplates that, during a post-divorce period during which a non-EEA national seeks to retain rights of residence, what is expected of him or her is the same as had been expected of his or her EEA

national spouse during the currency of the marriage. Put another way, such a spouse who does not yet qualify for a permanent right of residence on the basis of 5 years' residence in accordance with the requirements of the Directive, having retained a right of residence despite divorce, can complete the accumulation of the necessary 5-year period on the basis of his or her own activity, rather than having to rely upon the activity of his or her former spouse.

8. As I have said, in the United Kingdom, these provisions are transposed into domestic law by the Immigration (EEA) Regulations 2006. Regulation 10 provides, so far as is relevant:

**Family member who has retained the right of residence**

10. (1) In these Regulations, "family member who has retained the right of residence" means...a person who satisfies the conditions in paragraph...(5).

....

(5) A person satisfies the conditions in this paragraph if--

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified 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;...

(6) The condition in this paragraph is that the person --

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under Reg. 6...

And regulation 14 provides, again so far as is relevant:

**Extended right of residence**

...

14. (3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

9. The provision of the EEA Regs that is at the heart of the dispute between the parties is regulation 10(5)(b), which requires a person seeking a retained right of residence following divorce to show that he was residing in the United Kingdom in accordance with these regulations at the date of the termination of the marriage. The respondent contends that this requires that, at the date of the divorce it can be established that the EEA national spouse was in the United Kingdom exercising Treaty rights. I am satisfied that is not what is required, either by the Directive or

the EEA Regs. Before explaining why that is the case, it is necessary to consider briefly the authorities to which the parties have referred in submissions.

10. In *Amos v SSHD* [2011] EWCA Civ 552 Stanley Burnton LJ recorded, as is uncontroversial, that although the EEA Regulations sought to transpose into domestic law the Directive:

“... the regulations must be interpreted and applied consistently with the Directive unless that is impossible, in which case it would be necessary to disapply the offending provisions of the Regulations.”

At paragraph 29 he identified the following requirements of the Directive in the circumstances with which we are concerned:

(1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).

(2) Their marriages had to have lasted at least three years, including one year in this country.

(3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2.

From which it can be seen that it was considered to be a requirement of the Directive that the EEA national spouse continued to exercise Treaty rights up to the date of the divorce, if a retained right of residence was to be established by the spouse. Pausing there, as was recognised in *Amos*, it was made clear in *Diatta v Land Berlin* [1985] ECR 567 that:

“The members of a migrant worker’s family, as defined in article 10 of Regulation no 1612/68, are not necessarily required to live permanently with him in order to qualify for a right of residence under that provision.”

In *Amos* it was agreed by both parties, and so not subject to argument, so that it was not necessary for the court to decide the point, that:

“... it follows from that decision that separation short of divorce does not affect the right of the non-national spouse under Article 16 of the Directive if both the EEA national and his or her non-national spouse continue to reside in the same Member State..”

11. Interestingly, the Court of Appeal accepted in *Amos* that Article 13, concerned with retention of a right of residence following divorce, used the same language as is found in Article 12, which was concerned with the circumstances in which the widow of an EEA national might qualify for a retained right of residence:

“It is obvious that the Directive cannot be interpreted as requiring the widow or widower, in order to retain the right of residence, to show that her or his deceased spouse continues to work. The same must apply to Article 13.”

Despite this, at paragraph 29 the conclusion reached was that:

“Thus the requirements of the Directive applicable to the appellants were as follows:

- (1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).
- (2) Their marriages had to have lasted at least three years, including one year in this country.
- (3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2”

12. I do not find it at all easy to follow how one arrives at the second conclusion having departed from the first. All that stands between them, to explain the route from one to the other is (1) a reference to the qualifying condition, found in article 13(2)(a) of the Directive and in regulation 10(5)(d)(i) that the marriage had lasted at least 3 years prior to the *commencement* of divorce proceedings and that during one of those years the parties lived in the host Member state; (2) reference to the requirements of the penultimate paragraph (“the second sub-paragraph” ) of Article 13(2) that the persons concerned must continue to meet the conditions there set out and (3) note that article 18 confers a right of permanent residence after 5 years residence with requiring that the person seeking that status to have “lived” with the EEA national.

13. It may be that this is explicable only by the fact that in Article 13(2) reference is to “the persons concerned” in the plural and not just to the person seeking to establish a retained right of residence.

14. Thus, it was the conclusion in *Amos* that, one of the requirement of the regulations was that the spouse seeking to establish that he had a retained right of residence had to show that:

“He or she was residing in the UK in accordance with the Regulations at the date of the divorce. He or she will have been so residing if regulation 14 applied, i.e. if the EEA national spouse was a “qualified person”, i.e., for present purposes, a worker or self-employed person (as to which see the definitions in regulations 2 and 6)”

15. This does not provide an answer, however, to the question to be addressed in this appeal. In *NA (Pakistan) v SSHD* [2014] EWCA Civ 995, the Court of Appeal

considered an appeal from a decision of the Upper Tribunal (IAC) in which it had applied the approach taken in *Amos*, described above:

“The Court of Appeal (in *Amos*) said that the Regulations were consistent with this proposition, and that regulation 10(5) required the divorced third country national to satisfy the condition that their former EEA national spouse was residing in the UK in accordance with the Regulations at the date of the divorce.”

However, the Court of Appeal in *NA* made clear that *Amos* was not binding authority for the proposition that the regulations have correctly transposed the Directive and that there was such a requirement to be found in the Directive. That was because that issue had been dealt with by way of a concession. The court in *NA* concluded that:

“While there is some force in the Respondent's textual analysis of the title of Article 13 – in ordinary language a right is not “retained” on divorce if it does not subsist on that date – there is no less force in the Appellant's submission that the “Gateway” construction accords with the need to interpret Article 13(2) in a purposive manner, so as to avoid potential abuse by Union citizens who are, for example, contesting custody or rights of access to their children in divorce proceedings, or who have inflicted domestic violence upon their third country national spouse.”

Which led the court to find that the issue was not *acte clair* and so posed the following question for a preliminary ruling from the CJEU:

“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?”

16. Unfortunately, the CJEU did not answer that question but instead refined it and so posed for itself a different one to address, that being:

“... whether Article 13(2)(c) of Directive 2004/38 is to be interpreted as meaning that a third-country national, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host Member State, on the basis of that provision, where the divorce post-dates the departure of the Union citizen spouse from that member State.”

17. In addressing this different question, the reasoning set out was founded upon the opening proposition that Article 13(2)(c) was concerned with the preservation of rights of residence where that is justified by particularly difficult circumstances. The focus of the enquiry drifted further from the narrow ambit of the question posed by the Court of Appeal in that the CJEU next explained that where the Union citizen spouse had left the host member state before divorce proceedings were initiated, it was at that point that the right of residence of the non EEA spouse comes to an end, so that when divorce proceedings are later initiated there is no right of residence to be retained.

18. Finally, I have been referred to the decision of the EUJ in *Singh & Ors* [2015] EUJ C-218/14. This, it seems to me, is of not much assistance either because it is concerned with the position where the EEA national has left the host member state before divorce proceedings were initiated. It seems entirely clear and unambiguous that, as explained in *NA*, the right of residence had ended with the departure of the EEA national spouse and so there was no remaining right of residence to be retained. Thus, the ruling in *Singh*:

“Article 13(2) of Directive 2004/38/EC .... must be interpreted as meaning that a third-country national, divorced from a Union citizen, whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host Member State, cannot retain a right of residence in that Member State on the basis of that provision where the commencement of the divorce proceedings is preceded by the departure from that Member State of the spouse who is a Union citizen.”

19. The question at the heart of this appeal, which is whether the EEA national spouse must be exercising Treaty rights in the United Kingdom at the date of the divorce, that is, the date upon which the decree absolute is issued, falls to be answered as follows. Properly understood, there is no tension between the Directive and the EEA Regulations. Both set out two phases of requirements. First, a non EEA spouse cannot qualify for a retained right of residence unless the qualifying condition, that the marriage has lasted for at least 3 years prior to the initiation of divorce proceedings, during at least one of which years the couple resided in the United Kingdom, has been met.

20. Second, the non EEA national spouse has a right of residence as a family member while the marriage subsists, provided his EEA national spouse is exercising Treaty rights in the United Kingdom. Therefore, if the EEA national spouse leave the United Kingdom before divorce proceedings are initiated, the right to reside ends with her departure and there is no right to be retained on the subsequent initiation of divorce proceedings or the termination of the marriage.

21. Third, as a non-EEA national spouse has a permanent right of residence once he has accumulated 5 years' residence in accordance with the EEA regulations, he will not need a retained right of residence if that period of residence has been accumulated before divorce proceedings are initiated. Where, 5 years residence in accordance with the regulations has not been established before divorce proceedings are initiated by an EEA spouse who subsequently ceases to be a Qualified Person, either because she ceases to exercise Treaty rights or leaves the United Kingdom, the non EEA spouse will be entitled to retain his right of residence provided he meets both the gateway requirement of reg 10(5)(d)(i) and the requirements of the second sub-paragraph of the Directive, as transposed into domestic law by regulation 10(6).

22. In the language of Article 13 of the Directive, before a person can acquire a right of permanent residence, he must meet two requirements. The first requirement is that



of Article 13(2)(a), replicated in regulation 10(2)(d)(i), that he demonstrates that the marriage has lasted for at least 3 years, during at least 1 of which he resided in the United Kingdom. The second requirement is that he meets one of the conditions set out in the penultimate or second sub paragraph of Article 13(2). That means he must show that he is, during the period of residence sought to be relied upon, a worker or self-employed and that he has sufficient resources for himself and his family members (if any) not to become a burden on the host member state and that they have comprehensive medical insurance. That requirement is replicated in regulation 10(6).

23. The key point in this reasoning is this. The position under the Directive is that the non EEA spouse potentially qualifies for a retained right of residence once the marriage has lasted at least three years at the date of the initiation of the divorce proceedings, provided the couple lived in the United Kingdom for at least one of those years. The ambition of the Directive, as set out in recital 15 of the preamble, is that family members should be legally safeguarded in the event of divorce. That is achieved by the second sub paragraph of Article 13(2) (replicated in regulation 10(6)) which anticipates that, in the context of a marriage that ends in divorce, a non EEA spouse will continue to reside in the host member state for a period sufficient to qualify for a permanent right of residence by himself meeting the requirements previously met by their EEA national spouse.
24. I am reinforced in this conclusion by drawing an analogy with Article 12, as mentioned above, because plainly it cannot be a requirement of a widower of an EEA national spouse that his late spouse, and not he, continues to meet such requirements until five years qualifying residence has been accumulated.
25. Thus, Regulation 10(5)(b) requires that the non EEA spouse was residing in the United Kingdom in accordance with the regulations at the date of the termination of the marriage, but the non EEA national spouse may demonstrate that not just by establishing his former spouse continued to exercise Treaty rights in the United Kingdom up to the date of the divorce but by showing that he met the requirements of the second sub paragraph of the Directive, replicated at regulation 10(6) of the regulations.
26. For those reasons there is no tension between the Directive and the regulations. It follows that the judge made no error of law in his approach to and application of the regulations to the facts of the case before him.
27. The judge allowed the appeal because he found as a fact that the appellant's EEA national spouse was working at the date upon which divorce proceedings were instigated. The grounds for seeking permission to appeal set out the only challenge pursued as follows:

“It was accepted at the outset of the hearing that the only issue that needed to be established was whether in accordance with Regulation 10(5), the appellant's

sponsor was exercising Treaty rights at the date of their divorce on 17/09/2012. This was following a Case Management Meeting conducted on 19.05.2016....

It appears the Judge has made an error by basing his decision on whether the sponsor was exercising Treaty rights at the date divorce proceedings were instigated, rather than when it was finalised."

And permission to appeal was granted in the following terms:

"I am satisfied that it is arguable that the Judge materially erred regarding the applicable date when Treaty Rights were being considered."

Therefore, given that the only challenge pursued against the decision of the First-tier Tribunal Judge has failed, the appeal to the Upper Tribunal must be dismissed.

Summary of decision:

28. The First-tier Tribunal Judge made no error of law and his decision to allow the appellant's appeal is to stand.
29. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



Upper Tribunal Judge Southern

Date: 18 October 2017