Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00454/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 November 2018	**On 6 December 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

E M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: in person
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Callender Smith promulgated on 22 December 2016 dismissing her appeal against a decision of the respondent made on 18 December 2015 refusing to issue her a permanent residence card as confirmation of a right of permanent residence under the Immigration (European Economic Area) Regulations 2006.

2. For the reasons given in my decision promulgated on 1 August 2018, that decision was set aside to be re-made once directions set out at paragraph 12 of that decision had been completed.

3. The appellant provided the original of her son's British passport which is accepted by Ms Holmes as evidence of his nationality. The appellant also handed up a letter from the London Borough of Redbridge dated 15 February 2018 explaining her difficulties, and also a report of a Child and Family Assessment made in respect of her son in May 2018. It appears from this that the appellant had been evicted on 26 March 2018, has no money, is not entitled to benefits and her only regular finance is £84 a month in child support from the father of her child. It appears also that she needed food bank vouchers and baby clothing from a local baby bank, as well as milk, pursuant to Section 17. It also appears from the report that several attempts have been made to communicate with the child's father, but from whom there has been no response. It is stated that:

> "he is evasive with professionals and has not engaged in this assessment. [The appellant] states that she is not in communication with him".

4. It is noted also that the appellant had made it clear that she is the sole carer of her son and that she is meeting her child's needs though is being supported to do so. It is stated also

> "[The child's] sole carer is his mother, [the appellant]. He has not had a relationship with his father. All of his maternal family are in Ghana whom he has not met. He has not met his paternal family and it is not known where they are though it is thought to be the UK".

5. It is also recorded that the parents are no longer in contact with each other and the father has not been in contact since January 2018, his and his family's whereabouts being unknown.

6. As indicated in the directions given on the previous occasion, the fact of a British citizen child being born to the appellant is, in my view, a "new matter" within the meaning of Section 85 of the 2002 Act. Ms Holmes accepted that that was so and that she was, on the particular facts of this case, prepared to proceed for me to consider that matter without the need for an adjournment.

7. It is unfortunate that despite the directions I gave on the last occasion, the respondent did not obtain national insurance records relating to the appellant's former husband. There is only limited evidence of his income as shown by his tax returns and the tax paid. These are disclosed in the witness statement of an officer from HM Revenue and Customs.

8. In order to obtain a residence card confirming the right of permanent residence, the appellant needs to show that her former husband had been employed or was exercising treaty rights and the appellant needs to show that she falls within Regulation 10(5) which provides as follows:

"(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;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting".

9. The appellant's rights are dependent on her now ex-husband's status prior to the date of divorce. That is because she needs to show that she had accrued at least five years' lawful residence in accordance with the EEA Regulations (see Regulation 15(1)(b)).

10. There are a number of ways in which the appellant can show that she had lawful residence. It can be because:-

(i) her husband was a qualified person;

(ii) her husband had acquired permanent residence; and

(iii) she had retained the right of residence after the divorce.

The necessary five year period can be made up of a combination of all three of these types of residence.

11. For these reasons it is necessary to ask the following questions:-

(i) On what date did the former husband become a qualified person, that is a person exercising treaty rights?

(ii) Are there any gaps in him exercising that right within the five years after that date?

(iii) Did he cease to be a worker or otherwise a qualified person as a result of any of those gaps?

(iv) If not, on what date did the ex-husband acquire permanent residence?

12. It is only after these questions have been answered that it is possible to determine whether the appellant has acquired the right of permanent residence as on the chronology of this case where she entered the United Kingdom in 2009 and the marriage broke down in 2016, it is possible that she acquired the permanent right of residence before the marriage was terminated, in which case it is unnecessary for her to rely on having a retained right of residence. On the evidence before me, there is no evidence of the husband working or otherwise being a qualified person prior to 1 January 2013. That is in a letter dated 4 January 2014 from HM Revenue and Customs. This shows a gap of only five days in April 2011 and that there was continuous employment with Seabrook Warehousing Limited from 1 January 2013 at least until the date of enquiry 4 January 2014.

13. The witness statement from HM Revenue and Customs shows no PAYE employment records held for the tax years 2011/2012 to 2013/2014 but it does show income from Interserve in tax years 2014/2015 and 2015/2016. This inconsistency is unexplained but I draw no inferences adverse to the appellant on this; it is entirely plausible that the documents were given to her by her husband and she relied upon them in good faith. It is not submitted, nor am I persuaded that she has created false documents or has used documents knowing them to be false, and I bear in mind that the marriage with her husband broke down in difficult circumstances.

14. On the basis of this information I am not satisfied that the appellant's husband was exercising treaty rights prior to 2014. On that basis, as a matter of arithmetic, the appellant cannot show that she has acquired five years' lawful residence within the meaning of the Regulations, and she has not been exercising treaty rights as she is required to do by Regulation 10(6) after the date of the marriage to reach a total of five years and, in any event, the earliest at which she could do so would be 5 April 2019.

15. It therefore follows that the appellant has not shown she is acquired the permanent right of residence.

16. I turn next to the issue of whether she is entitled to a derivative residence card. Regulation 16 of the EEA Regulations provides as follows:-

> "16. (1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of –
>
> (a) a valid identity card or passport issued by an EEA State;
>
> (b) proof that he is a qualified person.
>
> (5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

(6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration and shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1)".

17. I am satisfied from the passport produced that the appellant is the mother of a British citizen; that the child is resident in the United Kingdom as is shown by her evidence and that of Social Services, and third, that the child would be unable to reside in the United Kingdom or another EEA state if the appellant left the United Kingdom for an indefinite period. That is because there is nobody else with whom the child could live. The father wishes to have nothing to do with the child, as is shown by his interaction with Social Services. It would appear also that despite giving a small amount of money to the appellant, it is wholly insufficient to support the child and there is no indication that he wishes to have anything to do with his son.

18. Having had regard to the decision of the CJEU in **Chaves-Vilchez**, and bearing in mind that in the circumstances the only realistic prospect would be for the child to be taken into care, that the child would effectively be forced to leave the United Kingdom with his mother were she to be removed.

19. Accordingly, I am satisfied that she fulfils the requirements of Regulation 16 and thus, by virtue of Regulation 20, she is entitled to a derivative residence card.

20. For these reasons, I allow the appeal albeit on a different basis, under the EEA Regulations.

Summary of Conclusions

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I re-make the decision by allowing the appeal under the EEA Regulations.

(3) An anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 30 November 2018

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00454/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2018
Extempore

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

E M
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

21. The appellant appeals with permission against the decision of First-tier Tribunal Judge Callender Smith promulgated on 22 December 2016 dismissing her appeal against a decision of the respondent made on 18 December 2015 refusing to issue her a permanent residence card as confirmation of a right of permanent residence under the Immigration (European Economic Area) Regulations 2006.

22. The appellant is a citizen of Ghana. She married a Netherlands citizen in 2009 and was issued with a family permit that allowed her to come to the United Kingdom in 2009 on that basis. She arrived at some point in November 2009. The marriage then broke down owing to domestic violence and the marriage was eventually on 21 May 2015.

23. The appellant supplied some documents to the Secretary of State which were also put to the First-tier Tribunal showing that her former husband had been employed. These date at the earliest from 13 November 2009 and end with wage slips from Seabrook Warehousing Limited covering the period of 3 May 2013 to 4 April 2014. Importantly there is a document from HM Revenue & Customs dated 4 January 2014 which sets out some of the former husband's employment record. There is also a letter from Poolfresh Limited which confirms that the former husband had been working for them from 1 May 2014 to 1 June 2015.

24. The Secretary of State did not accept the evidence noting that contact had been made with Seabrook Warehousing Limited and that in an email of 2015 they had said he is not an employee.

25. The judge considered the evidence and it appeared accepted the evidence set out in the letter from HMRC which importantly includes a reference to the husband at that point being employed by Seabrook Warehousing Limited. The judge does however not accept that he continued to work for them and considered that because of the email correspondence with the Home Office that there was unreliability of the evidence. He also considered that the evidence from Poolfresh was not specific to show that the appellant's husband had been working for them. On that basis, he was not satisfied that there had been continuity of employment and he dismissed the appeal.

26. The appellant appealed that decision on the basis that the judge had erred first in not considering the document properly and reaching inconsistent findings as to whether or not the appellant's husband had been employed by Seabrook Warehousing because the HMRC had said that he did, yet the judge considered that this was inaccurate. Second, that the judge improperly rejected the evidence from Poolfresh and further that the judge should have made a direction pursuant to Amos v SSHD [2011] EWCA Civ 552.

27. Although the appeal was lodged out of time, time was extended by Upper Tribunal Judge Plimmer who on 15 May 2018 granted permission.

28. I heard submissions from M and from Mr Tarlow.

29. I am satisfied that the judge did err in his approach to the evidence about Seabrook Warehousing Limited. That is because he accepts the letter from HM Revenue & Customs which said that he was working for Seabrook Limited but failed properly to explain why the email correspondence showed that he was not, given that the email only says that at that point in May 2015 he was not working for them. That does not mean that he had not worked for them previously. Second, I consider that in this

case the judge erred in that this appears to have infected his consideration of the letter from Poolfresh.

30. For these reasons I consider that the decision did involve the making of a material error of law and I set it aside. I do not consider that it is appropriate to re-make the decision today because there is not sufficient evidence of the former husband's employment. I also consider that it would in this case be appropriate to make a direction in line with the Court of Appeal's decision in **Amos**.

31. Further, there is an additional fact to be taken into account in that it now appears that the appellant is the mother of a child who is a British citizen. That is clearly a new matter and something about which the Secretary of State will need to take action but need not .

32. I therefore make the following directions.

    (1) The respondent is directed to contact HM Revenue & Customs in order to obtain details of the appellant's ex-husband Mr James Atta Krufi Nuamah, whose National Insurance number is SG 79 14 75 D, and to obtain from HM Revenue & Customs details of his national insurance records since his entry into the system, and the date of divorce. Second, to obtain income tax records from HM Revenue & Customs.

    (2) The material received is to be served on the Upper Tribunal and on the appellant at least ten days before the next hearing, if necessary details redacted to preserve data protection. So far as it is necessary these directions are to operate as directions made pursuant to Rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 requiring HM Revenue & Customs and/or DWP to disclose the information required. Pursuant to Rule 14 it is to be directed that the information provided pursuant to the directions is not to be disclosed by the parties to any third party without further order of the Tribunal.

    (3) The Secretary of State is to consider whether in the light of the fact that the appellant has a British citizen child which is a new, the appeal should nonetheless proceed on the basis that that should be considered. The response must be made within 28 days.

    (4) The resumed hearing will be listed to be remade not before 20 September 2018 to allow time for the Secretary of State to get the documents.

Signed Date 30 July 2018

Upper Tribunal Judge Rintoul