



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/06530/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre  
On: 18<sup>th</sup> June 2019

Decision and Reasons Promulgated  
On 25<sup>th</sup> June 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

RN  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: (in person)

For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 25<sup>th</sup> October 1979. She appeals with permission the decision of the First-tier Tribunal (Judge Anthony) to dismiss her appeal against a decision to refuse to grant her 'retained' rights of residence under the Immigration (European Economic Area) Regulations 2016.

2. The matters in issue before the First-tier Tribunal were threefold. First, had the Appellant's EEA national husband been exercising treaty rights at the date that divorce proceedings were initiated; second, had she been exercising treaty rights as if she were an EEA national; and three whether she was in fact divorced. The First-tier Tribunal found against the Appellant in respect of all three matters and dismissed the appeal.
3. The Appellant drafted grounds herself which First-tier Tribunal Judge EM Simpson, sensing potential injustice, considered arguable enough to grant permission. Judge Simpson was quite right to sense injustice, and that is a matter that I shall return to below. The grounds however, are not arguable, and on the law the appeal must be dismissed.
4. The relevant parts of Regulation 10 read as follows:

10.—(1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

...

(5) The condition in this paragraph is that the person (“A”) –

(a) **ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;**

(b) **was residing in the United Kingdom in accordance with these Regulations at the date of the termination;**

(c) 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 or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the

child is under the age of 18 and where 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 A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

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

(a) **is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6;** or

(b) is the family member of a person who falls within paragraph (a).

5. The evidence before Judge Anthony was very limited. He appears to have dealt with the matter on the papers; Judge Simpson considered that this might have been a procedural error but for the reasons I explain any such error would be immaterial. That is because at the date of the hearing before the First-tier Tribunal there was no prospect of the appeal succeeding under Regulation 10(5). Judge Anthony found no evidence that the Appellant was in fact divorced from her husband. At the date he heard the appeal, on the 16<sup>th</sup> November 2018, that was plainly correct, since I have now been shown the *talaqnama* from Pakistan which shows the date of dissolution of marriage to be the 17<sup>th</sup> November 2018. Judge Anthony was further not satisfied that the Appellant herself had been working at the relevant time; since there was nothing before him to indicate that she had, this too was plainly a finding open to him on the evidence. Nor could the Appellant's ex-husband have possibly been exercising treaty rights upon either the initiation or completion of divorce proceedings since at all material times he was in Pakistan. It follows that on the facts he was bound to dismiss the appeal under the Regs and there was no error of law in his decision.
6. The appeal under the Regs dismissed, I find that it is nevertheless important to mark the unusual and difficult circumstances of this case.
7. The Appellant was married to her husband in Pakistan on the 29<sup>th</sup> May 2009. He is a dual Pakistani /Spanish national and they duly moved to live in Spain. By the time they arrived in the United Kingdom on the 25<sup>th</sup> April 2014 they had three children, born in 2009, 2011, and 2013.
8. As the Appellant's children grew older her husband started exhibiting increasingly erratic and strange behaviour. He was aggressive and possessive. When the Appellant attended college to take a diploma he would follow her there and harass her. He was violent towards her and the children. Social Services became involved with the family after the eldest child confided in her

schoolteacher that her father had hit her. At one point the Appellant herself approached the police because she became afraid that her husband was going to take the children to Pakistan. None of these interventions came to anything and on the 6<sup>th</sup> April 2018 when the Appellant was at work, her husband took the children, went to the airport and flew to Pakistan. He took with them a good deal of the Appellant's money, jewellery and her Pakistani passport with her EEA family permit enclosed. On the 2<sup>nd</sup> May 2018 the Family Division of the High Court (HHJ Butler), being satisfied that the children were habitually resident in the United Kingdom, made an order under section 8 of the Children Act 1989 that the children be returned to the United Kingdom forthwith.

9. This was the background to the Appellant making, on the 22<sup>nd</sup> May 2018, the application under the EEA Regulations. For the reasons set out above, that was an application bound to fail, since at that stage she was no longer a family member of an EEA national exercising treaty rights. Her husband had ceased his self-employment as a taxi driver on the 5<sup>th</sup> April 2018 and he had ceased to be in the United Kingdom by the evening of the 6<sup>th</sup>. Applying Singh C-218/14 EU: C: 2015: 476 her rights came to an end that day; by the time that the divorce proceedings were initiated in August 2018 she had no rights to 'retain'. In NA C-115/15 ECLI: EU: C: 2016 487 the Court of Justice considered the very same factual matrix: a woman subjected to domestic violence by an EEA partner who left the host state before divorce proceedings could be instituted. The Court considered the purpose and meaning of the Directive, and recognised the potential for abuse by the perpetrator, but concluded:

51. In the light of the foregoing, the answer to the first question is that Article 13(2)(c) of Directive 2004/38 must 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, cannot rely on the retention of her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State.

There can therefore be no doubt that the Regs are of no assistance to the Appellant.

10. The Appellant asked me to consider human rights law in the alternative. Unfortunately, I cannot because the Respondent has not yet had an opportunity to consider whether leave should be granted on a discretionary basis, and this appeal was brought under the EEA Regs. I therefore lack the jurisdiction to do so: Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353. It might further be said that this is not so much a case that engages human rights – which are primarily engaged by the Appellant's relationship with three victims of abduction currently resident in Pakistan – but one which calls for the Respondent to exercise his discretion.
11. The words 'exceptional' and 'compelling' are often used in this jurisdiction to refer to cases which are sad, but frankly commonplace. I am however in no

doubt at all that they could properly be applied to the predicament that the Appellant currently finds herself in. The post-script to the events described above is as follows:

- i) The Appellant has not seen her children since the morning of the 6<sup>th</sup> April 2018 when she left them and went to work;
- ii) The children's father returned to the United Kingdom last month and was arrested on arrival at Glasgow airport. I understand from Mr McVeety that Home Office records show that he was arrested while still on the plane. He is currently being held on remand pending a trial in October, at which the Appellant is expected to give evidence;
- iii) The Appellant and her family have launched proceedings in the courts in Pakistan to retrieve custody of the children, but her father has been told that the children will not be allowed to live with him unless the Appellant returns to Pakistan;
- iv) This she is unwilling to do, because she fears that as soon as she does this, her ex-husband's family will simply remove the children from the jurisdiction of Pakistan, and return them to Spain, where they have two uncles living with permanent residence;
- v) The Appellant would then be stuck in Pakistan with no means to get back to Europe and the children;
- vi) If she leaves the United Kingdom she will not be able to appear as a witness in the October trial and the prosecution against her ex-husband will likely collapse;
- vii) The Appellant has sought the advice of groups such as 'Reunite International' but has been told that it will be difficult for them to pursue her case if her immigration status in this country remains unresolved;
- viii) The Spanish embassy in the United Kingdom have informed the Appellant that they are unable to pursue any action to get the children back because they were resident in the United Kingdom.

12. It seems to me that in these circumstances the most appropriate course of action would be for the Appellant to make an application for Discretionary Leave 'outside of the rules'. If such an application were to be made the Respondent may wish to give particular consideration to these matters: that the Appellant's presence in the United Kingdom is required by the CPS in the trial against her

ex-husband, and that if her status in the United Kingdom is regularised in the short-term, this may enable her to make some headway in her struggle to get her children back. The Appellant tells me that since her husband has taken her passport she has been unable to work in the United Kingdom and has no money at all. I have advised her that if she should make an application to the Home Office, she should in those circumstances accompany it by making an application for a 'fee waiver' and enclosing the required evidence.

### **Decisions**

13. The determination of the First-tier Tribunal contains no error of law and it is upheld.
14. I make an order for anonymity in the following terms:
15. "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Upper Tribunal Judge Bruce  
Dated 20<sup>th</sup> June 2019