



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003036
First-tier Tribunal No:
EA/00293/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS ANASTASIA ZABARCHUK

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Zabarchuk in person

For the Respondents: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 20 February 2023

DECISION

1. The Appellant appeals against the decision of First-tier Tribunal Judge Lucas promulgated on 20 April 2022 (“the Decision”) dismissing the Appellant’s appeal on EU law grounds against the Respondent’s decision dated 11 October 2021 refusing her settled or pre-settled status under the EU Settlement Scheme (“EUSS”).
2. The basis of the Respondent’s decision was that the Appellant had not completed a continuous qualifying period of five years as the family member of an EEA national. The Appellant misunderstood the Respondent’s reasons in that regard which were predicated on a lack of evidence that “the relevant EEA citizen” (that is to say the Appellant’s EEA national husband) had been exercising Treaty rights for a continuous period of five years. That in turn was based on

information which the Respondent had that the Appellant's husband had been convicted and sentenced to a term of imprisonment in October 2019 and had not completed a continuous five year period of residence at that time. I was informed by Ms Zabarchuk that in fact her husband had not been sent to prison in October 2019 but was "time served" as the result of a period of imprisonment of about eight or nine months completed by that time. That does not however improve the Appellant's case. Her EEA national husband's period of residence under EU law would have been broken by the term of imprisonment unless he had completed a continuous period of five years' residence under EU law by that time. There is no evidence that this was the case and the Respondent's position was that he had not done so.

3. Unfortunately, since the Appellant is in person, she did not understand the basis of the Respondent's decision. She thought that she needed to demonstrate her own exercise of Treaty rights for a continuous period of five years. That she could not do. She married her EEA national husband in June 2016, and was given her residence permit as a family member in November 2016. By the time that her husband was sent to prison, she had only completed about two and a half years as the family member of an EEA national. Whilst she could continue to rely on her period of residence after his release from prison, she needed to show that he was exercising Treaty rights which she did not do. She was unable to show that she had completed a five years' continuous period, continuity having been broken by his sentence of imprisonment. The Appellant has now sought a divorce but I accept at the present time remains married to her husband. There is though no evidence before me as to his status in the UK. More importantly, the Appellant did not provide evidence either to the Respondent or to Judge Lucas about that status.
4. Again, very unfortunately, the Appellant did not understand that she needed to provide evidence about her husband's exercise of Treaty rights to the Tribunal. She provided some evidence as to her own employment in the UK in the period at least from January 2017 onwards (as the Respondent accepted) but that could not avail her for the reasons given.
5. Also unfortunately, the Appellant had asked for the appeal to be determined on the papers. Accordingly, Judge Lucas was unable to explain to her what evidence was missing before him. He considered the evidence which he did have. Importantly at [4] of the Decision he said this:

"There is reference to a prison sentence from October 2019 and insufficient evidence of 5 years continuous presence prior to that sentence."

6. As Ms Everett submitted and I accept (and indeed Ms Zabarchuk accepted) that was correct as a matter of fact. Ms Zabarchuk had unfortunately misunderstood what the Judge was there saying. However, that statement and reason for rejecting the appeal is correct in fact and in law. I cannot interfere with a decision of the First-tier Tribunal if it does not contain an error of law.
7. I accept that it was not entirely clear from the refusal of permission to appeal of First-tier Tribunal Judge J M Dixon that the reason why the Appellant's appeal was bound to fail was based on her husband's residence (and lack of evidence in this regard). Upper Tribunal Judge Kamara granted permission on 10 November 2022 on the basis that "some unfairness might have taken place" given the reason for dismissing the appeal was based on lack of evidence. However, that also does not identify that the main reason why Judge Lucas dismissed the appeal and why the Respondent refused the application in the first place was due to the lack of continuity of the Appellant's husband's residence and not that of the Appellant herself. Her appeal was on that basis always doomed to failure.
8. Ms Everett showed her usual compassion and said that she had tried to verify the position in relation to the Appellant's husband's status on the Home Office database prior to the hearing in case that disclosed anything which could avail the Appellant but had been unable to find any record for him.
9. As it is, given the lack of evidence before the Respondent or Judge Lucas and, for the reasons I have given above in relation to the lack of any error of law made by Judge Lucas, I am quite unable to find any error of law in the Decision. I therefore uphold that decision.
10. As I explained to Ms Zabarchuk and her current partner, although she is now unable to make an application under EUSS as the relevant time period has expired, she may be in a position to make a new application based on her current relationship in domestic law (her current partner has settled status). As Ms Everett and I both made clear, however, it is not for us to offer legal advice and she would be well advised to seek professional assistance in relation to any further application.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Beach promulgated on 20 April 2022 does not contain an error of law. I therefore uphold the decision with the consequence that the Appellant's appeal remains dismissed.

Signed: L K Smith
Upper Tribunal Judge Smith

Dated: 20 February 2023