IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000154
(EA/00585/2022)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 May 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Ali El Haj Khalil

Respondent

Representation:

For the Appellant: Mr Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr Junior, Counsel instructed by Lawland Solicitors

Heard at Field House on 12 April 2023

DECISION AND REASONS

1. The Respondent Mr Khalil is a Palestinian, born on the 19th September 1990 in Lebanon. On the 21st December 2022 the First-tier Tribunal (Judge Ian Howard) allowed his appeal with reference to the EU Settlement Scheme. Judge Howard found that Mr Khalil was entitled to have his retained right of residence recognised under Appendix EU of the Immigration Rules, because he was formerly the family member (spouse) of an EEA national exercising treaty rights at the time that the marriage came to an end. That decision is now appealed, with permission, by the Secretary of State.

2. The Secretary of State had refused the original application because back in 2015 she had refused to grant Mr Khalil a permit to reside in the UK on the basis of that very same marriage. His erstwhile wife was a Latvian national, and the pair had contracted a proxy marriage in Lebanon. In 2015 the operative jurisprudence had required Mr Khalil to demonstrate that his marriage was recognised in Latvia as well as Lebanon: Kareem (Proxy marriages – EU Law) [2014] UKUT 24. This he could not do. It followed, reasoned the Secretary of State, that the marriage was never valid. In addressing that ground for refusal Judge Howard noted that Kareem had been overturned by the Court of Appeal in Awuku [2017] EWCA Civ 178. All that Mr Khalil need do is establish that the marriage was legally valid in Lebanon, and applying the doctrine of *lex loci celebrationis*, it would also be recognised in the UK. Judge Howard was satisfied that this burden was discharged, and found the marriage to be valid. There is no challenge to that finding, and it stands.

3. The second matter in issue was whether Mr Khalil's former wife had been exercising treaty rights at the date that the divorce proceedings were initiated. In 2015 the Secretary of State had refused to grant a residence permit for a lack of evidence on this point, a Tribunal had agreed in 2016, and there was not sufficient evidence available today to gainsay those decisions. Judge Howard disagreed. His decision reads as follows:

> 26. Was she exercising Treaty rights at the date of their divorce, 28th June 2019? Her income has always been modest and there is a record of her having been in receipt of an income between 2014 and 2018. I have a letter from her erstwhile employer and HMRC documents covering that period. I am satisfied she was exercising Treaty rights during that period. In order properly to be said to be exercising Treaty rights the qualified person need only show they are pursuing an economic activity that is effective and genuine, see Levin [1982] EUECJ R-53/8.
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> 27. In fairness to the appellant he does not claim that she worked after their divorce in June 2019. He does however state that she was working in 2018 when the marriage was falling apart. This is corroborated by the HMRC documents and what Mr Mohamad Mohamad told me. Again looking at the evidence cumulatively I am satisfied that Kristine Putrasevica was exercising Treaty rights.

4. The Secretary of State applied for, and obtained, permission to argue before this Tribunal that these conclusions were irrational. The fact that Mr Khalil's ex wife was exercising treaty rights in 2018 is not relevant to whether she was doing so at the date of the divorce in 2019.

5. Before me the appeal took a surprising turn when Mr Terrence very candidly volunteered that the Secretary of State's grounds were misconceived. Had this been an appeal under the Immigration (European Economic Area) Regulations 2016, brought with reference to regulation 10, it would have been a requirement for Mr Khalil to show that his ex-wife had been a "qualified person" at the time that the divorce proceedings were initiated (see for instance Baigazieva [2018] EWCA Civ 1088). This was not however an appeal brought under the Regulations. Mr Khalil had applied for a recognition of his right of residence under the EU Settlement Scheme, and as such his application fell to be considered with reference to Appendix EU of the Immigration Rules. Mr Terrence submitted that

Appendix EU contains no such requirement. The definition of a 'family member of a relevant EEA citizen' set out at annex 1 makes no reference to the EEA national being 'qualified': it simply refers to those who retain a right of residence by virtue of a relationship with "a relevant EEA citizen". Mr Terrence further acknowledged that whether the EEA citizen in question is "relevant" does not turn on whether she was exercising treaty rights at the date of decision. On that basis I was invited to dismiss the appeal.

6. The Secretary of State has withdrawn her case before the Tribunal and the appeal is therefore dismissed, with the First-tier Tribunal decision being upheld.

Notice of Decision

7. The appeal is dismissed.

8. There is no order for anonymity.

Upper Tribunal Judge Bruce
12th April 2023