Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38351/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1st April, 2014	**On 15th May, 2014**
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Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS PATRICIA MELO

Respondent

Representation:

For the Appellant: Mr Kingham, a Home Office Presenting Officer
For the Respondent: Ms Rest, David Gray Solicitors

DETERMINATION AND REASONS

1. The Secretary of State for the Home Department is the appellant in this appeal but to avoid confusion I shall refer to her as the "claimant".

2. The respondent is a citizen of Brazil, who was born on 27th April, 1974, and who on 17th December, 2012, applied to the Secretary of State for the Home Department for a residence card as the former civil partner of an EEA national exercising treaty rights in the United Kingdom.

3. The Secretary of State for the Home Department refused the respondent's application on 8th August, 2013, and the respondent appealed to the First-tier Tribunal.

Immigration History

4. The respondent first applied for a student visa on 22nd January, 2004 which was granted on 29th January, 2004. On 26th February, 2005 the respondent applied for a further student visa which was granted on 11th April, 2005. On 13th February, 2008 the respondent applied for a certificate of approval for a civil partnership which was issued on 28th February, 2008. On 29th March, 2008 the respondent entered into a civil partnership with Marlia Cristina Borges Dos Santos at Hammersmith Registry Office. On 1st March, 2012, a conditional dissolution order was made in Newcastle-upon-Tyne County Court provided that unless sufficient cause be shown to the court within six weeks the conditional order should be made final.

6. The claimant's Reasons for Refusal Letter of 8th August, 2013 made it clear that in order to qualify for a retained right of residence following divorce from an EEA national in accordance with Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") evidence that was required that the former EEA spouse was continuing to exercise free movement rights at the date of dissolution. The respondent provided with her application payslips for her former civil partner up to 10th March, 2012, but since the civil partnership was not dissolved until 12th April, 2012, this did not show that her civil partner was exercising treaty rights at the date of dissolution.

7. The respondent appealed to the First-tier Tribunal and her appeal was considered by First-tier Tribunal Judge K Henderson on 16th December, 2013, at Bradford. In a determination promulgated on 23rd December, 2013, the Immigration Judge found that the respondent had sought to be frank concerning her relationship with the events surrounding the separation from her civil partner and found that the respondent had no contact with her former partner, who is a citizen of Italy. At paragraph 27 the judge found that the civil partnership had been dissolved and at paragraph 31 of the determination he found that there was no evidence to show that the respondent had made any efforts to obtain the relevant information, other than by directly trying to contact her partner. The judge said, "I have sympathies with her reasons for not wishing to be in communication but pursuit of the required information was necessary for her to show that the condition of the Regulations had been met." The required information referred to was evidence that the sponsor, an Italian citizen, was still in the United Kingdom and exercising treaty rights. In paragraph 32 the judge said this:-

"My conclusion therefore is that the [respondent] has not provided sufficient evidence to show that she retained rights of residence after her civil partnership was finally dissolved on 12th September 2012."

8. The judge went on to note that the respondent had made an application to the claimant on the basis that she fulfilled the requirements of the long residence Rules, but the correct form on which to make that application was a Form EEA 4. The judge found that the claimant's refusal letter did not address important additional assertion made by the respondent concerning her long residence in the United Kingdom. She did not make an application in the correct form but, found the judge, ought to have been informed that if she wished to make an application under paragraph 276B of the Immigration Rules, then that was an option open to her without reference to a parent of partner She concluded that the principles outlined in *Rodriguez (flexibility policy)* [2013] UKUT 0042 (IAC) must apply and at paragraph 37 said "the [respondent] has been told to leave because she has no basis to remain here but there has been no consideration of the additional factors she raised prior to the [claimant's] decision, that decision then being that she had no basis remaining in this country. She had been told in the notice accompanying the Reasons for Refusal Letter make an appeal on grounds including that "the decision is not otherwise in accordance with the law". It is arguable that she did say citing both her long residence and private life in this country". The judge then purported to allow the respondent's appeal to the extent that the decision was not in accordance with the law.

9. The claimant challenged the decision, pointing out that the judge had already found in her determination that the respondent had not provided sufficient evidence to show that she met the requirements of the Regulations. It appears that, applying *Rodriguez*, the judge concluded that the Secretary of State's decision was not in accordance with the law, because the Reasons for Refusal Letter did not address the additional assertion that the respondent qualified under the long residence provisions. The grounds suggest that the judge had given inadequate reasons why *Rodriguez* should apply where the Secretary of State for the Home Department made the decision on the application and submitted by the respondent.

10. Ms Rest, who appeared on behalf of the respondent, told me that her client's instructions are that she does not wish to pursue her appeal. Miss Rest told me that her client was currently living in Brazil where she was again making application for a visa as a spouse. Mr Kingham told me that the Secretary of State wished to pursue the appeal. On the basis of the findings by the judge at paragraph 32, she should have simply found that the respondent was not a qualified person and dismissed the appeal.

11. Ms Rest confirmed that it cannot be right that the Home Office are required to advise respondents to make applications under a different route on receipt of an application.

12. I concluded that the judge had erred. There was no basis for her to go on and consider assertions made by the respondent that she qualified for

leave to remain in the United Kingdom on a basis entirely different from that which she applied to the Secretary of State. On the basis of her finding at paragraph 32 the judge's decision, the judge should have proceeded to dismiss the respondent's appeal. I set aside the judge's decision. I substitute my decision for hers. The respondent's appeal is dismissed.

Upper Tribunal Judge Chalkley