IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35292/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2015	**On 25 March 2015**
Oral Determination	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR PETER GYAU APPIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wells, Counsel instructed by Maliks and Khan Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Cary promulgated on 17 September 2014 dismissing his appeal against the decision of the Secretary of State to refuse to issue him a residence card as confirmation of his right of residence as a family member who had retained the right of residence pursuant to the Immigration (European Economic Area) Regulations 2006. In light of the subsequent developments in this case it is unnecessary to go into detail

regarding that decision suffice it to say that the judge concluded that the appellant was not entitled to the residence card requested, given that he was not satisfied that the appellant's wife was a qualified person within the meaning of Regulation 6 of the Immigration (European Economic Area) Regulations 2006 at the time of her divorce in September 2012 and that therefore the appellant was not residing in the United Kingdom in accordance with the 2006 Regulations at the date of the termination of his marriage.

2. The appellant applied for permission to appeal to the Upper Tribunal which was on 30 December 2014 granted by Upper Tribunal Judge Storey, who noted:

> "It is arguable that the First-tier Tribunal should not have followed the decision in **Amos** given the reference made by the Court of Appeal in **NA [2014] EWCA Civ 995** and it cannot be excluded that the eventual ruling of the CJEU on the questions in **NA** may mean that the appellant can rely on retained rights. Further, it is not even clear to me that the appellant needs to rely on retained rights since if his wife acquired a right of permanent residence prior to divorce proceedings then so did the appellant and that right can only be lost by absence abroad of two years."

He directed that the matter should then be booked for a case management hearing.

3. At the hearing it was accepted between the parties that the judge had erred in his decision and had failed to take into account that it may not have been necessary for the appellant to show that his wife had been working at the date of the divorce as, by that time, she had been resident here and working for well in excess of five years. On that basis she (and the appellant as her dependant) would have acquired the right of permanent residence prior to divorce proceedings being instituted. Accordingly I am satisfied, and as both parties agree, that there determination did involve the making of an error of law. It is therefore necessary to remake the decision.

4. I am indebted to Mr Whitwell for handing up a letter dated 20 March 2015 which sets out a brief chronology reciting that:

   (a) the applicant and his wife were married on 14 November 2003;

   (b) the applicant was granted a residence card on 20 February 2006

   (c) the applicant's wife applied for a document certifying her permanent residence on 9 February 2011, it being granted on 25 May 2011.

5. The letter reads materially:

> "On this chronology and mindful of **Diatta v Land Berlin** [1985} ECR, [1985] EUECJ R-267/83, it would appear to be the position that

> the Aappellant acquired a permanent right of residence on 25 May 2011, prior to divorce proceedings being concluded, pursuant to Regulation 10 of the Immigration (European Economic Area) Regulations 2006, as amended. It is noted there is no evidence to suggest the Appellant has left the United Kingdom for a period in excess of two years.
>
> Whilst it is noted in the above-mentioned Direction that reference is made to '*divorce proceedings'* and '*the date of initiation of divorce proceedings*', the respondent did not challenge the appellant's ability to meet Regulation 10(d) of the Immigration (European Economic Area) Regulations 2006 with reference to her previous consideration of 2 August 2014."

6. In light of this information I consider that the appeal has to be remade allowing the applicant's appeal on the basis that as it appears from this information he was at the material time a person who had acquired the right of permanent residence. On that basis the appeal is allowed.

7. In the circumstances, it would be sensible for the appellant now to apply for a document confirming his right of permanent residence under the EEA Regulations.

Notice of Decision

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

2. I remake the decision by allowing the appeal under the EEA Regulations.

Signed Date: 23 March 2015

Upper Tribunal Judge Rintoul