Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35530/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 September 2015	**On 4 January 2016**

Before

THE HONOURABLE LORD BURNS
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ELIZABETH OLUWATOYIN OLOWONIYI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr M Iqbal, Counsel instructed by Britain Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of the First-tier Tribunal. The First-tier Tribunal Judge allowed the appeal against the decision of the Secretary of State to refuse to issue a residence card on the basis of a retained right of residence pursuant to the Immigration (European Economic Area) Regulations 2006 (" The Regulations").

2. For the sake of continuity Ms Olowoniyi will be referred to as the appellant as she was before the First-tier Tribunal. She is a citizen of Nigeria and her

date of birth is 12 June 1980. It appears from correspondence from her solicitors that she came to the UK as a visitor in 2006 and overstayed. She married a Portuguese national on 16 October 2008 and on 11 May 2011 she was granted a residence card pursuant to the 2006 Regulations which was valid until 11 May 2016. The appellant gave birth to her first child on 31 December 2013. On 5 December 2014 the appellant and her Portuguese husband divorced. On 20 June 2014 the appellant made an application for a residence card on the basis that she had retained right of residence pursuant to reg. 10 of the 2006 Regulations. At this time she was pregnant with her second child. She was last employed in June 2013 and she claims to have been self-employed since. The application was refused on 28 August 2014. Judge Oliver allowed her appeal and the Secretary of State was granted permission to appeal. Thus the matter came before us.

3. It is common ground that the Regulations faithfully transpose the requirements of Directive 2004/38/EC ("the Citizens Directive") into United Kingdom domestic law. A non-EEA national who is divorced from her Union citizen spouse is able to benefit from a retained right of residence in the circumstances set out in reg.10 of the 2006 Regulations. Reg.10 is the transposition of Article 13 of the Citizens Directive. It requires conditions to be met; some by the EEA national former spouse and some by the non-EEA national. Upon divorce, the appellant was no longer "the family member of the EEA national" (her husband) and thus the extended right to residence under reg. 14(2) came to an end. However, she became eligible for such a right of residence after her divorce under reg. 14(3) if she retained it by meeting the requirements of Reg. 10(5) and (6).

Reg.10(6)(a) imposes a condition that; "the person who is not an EEA national but would, if he were an EEA national, be a worker, self-employed person or a self-sufficient person under reg.6." The time at which this condition is to be met and the period during which the condition has to be met are nowhere specified in the Regulations.

The Issues

4. The issue in this case is whether these conditions are to be met by the non-EEA national at the date of the decree absolute (5 December 2014) (this is the first point at which reg.10 might operate), the date of the decision (29 August 2014) or the date of the hearing (30 March 2015) and whether there is any requirement to establish continuous economic activity throughout this period.

5. The relevant parts of reg.10 read as follows:

> "(5) A person satisfies the conditions in this paragraph if –
>
> (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of the qualified person;]

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

(c) he 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;

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

(a) is not an EEA national but would, if he 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).

Directive 2004/38/EC (Citizens' Free Movement)

Article 13 (retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership)

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a member state where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host member state; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a member state has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a member state has the right of access to a minor child, provided that the court has ruled that such access must be in the host member state, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence and have comprehensive sickness insurance cover in the host member state, or that they are members of the family, already constituted in the host member state, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis."

6. In Amos & Anor v Secretary of State for the Home Department [2011] EWCA Civ 552 the Court of Appeal considered reg.10 and the Citizens Directive and how it applied to a non-EEA national ex spouse. The following paragraphs are relevant to the issues in this case:

"29. Thus the requirements of the Directive applicable to the appellants were as follows:

(1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).

(2) Their marriages had to have lasted at least three years, including one year in this country.

(3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2.

30. The Regulations are consistent with these propositions. Regulation 10(5) provides that a 'family member who has retained the right of residence' must in a case such as the present appeals satisfy the following conditions:

(a) His or her divorce from the EEA national.

(b) He or she was residing in the UK in accordance with the Regulations at the date of the divorce. He or she will have been so residing if regulation 14 applied, i.e. if the EEA national spouse was a 'qualified person', i.e., for present purposes, a worker or self-employed person (as to which see the definitions in regulations 2 and 6).

(c) He or she is a worker or self-employed person, and therefore satisfies paragraph (6).

(d) 3 years' marriage, including at least one year's residence in the UK."

7. It is accepted in this case that the appellant satisfies reg.10 (5) (a), (b) and (d). The only issue is whether or not the appellant satisfies reg. 10 (6) (a).

The Arguments Advanced by the Parties

8. The Secretary of State's position is that a non-EEA national must establish that she meets the requirements of reg. 10(6) (that she is economically active) continuously from the date of the divorce to the determination of her application (the date of the decision of the Secretary of State or the date of the hearing). The appellant's position, advanced in Mr Iqbal's written submissions, is that it is not possible to construe reg. 10 (6) as laying down a requirement which is to be met at the date of hearing because it flows out of reg. 10(5) which refers to circumstances surrounding the event of divorce. Thus reg. 10 (6) must not be interpreted in such a way that it offends reg.10 (5). We will discuss these issues first and then turn to Mr Iqbal's first, but undeveloped argument which is, on reliance on HS (EEA: revocation and retained rights) Syria [2011] UKUT 00165, the appellant's appeal must be allowed.

Discussion

9. The first position we will consider is that of the non-EEA national having to establish that she meets reg. 10(6) at the date of the decision and/or hearing. However, it is clear to us that this would be problematic for a number of reasons. A non-EEA national who meets the requirements of reg.10 (6) at the date of divorce and thus in theory retains a right of residence could lose this if unable to establish economic activity on an arbitrary future date. We consider the "loss" of retained rights when considering continuity, but suffice to say for the hypothesis under consideration, that we consider "losing" a "retained" right is not contemplated in the 2006 Regulations other than flowing from a decision in terms of reg. 14(5).

10. There is support for a retained right crystallising at the date of the hearing in the judgment in Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346. However, this support is wholly superficial. The case concerned the admissibility of evidence in EEA cases and decided that Section 85A of the Nationality, Immigration and Asylum Act 2002 has no bearing on an appeal under the 2006 Regulations. The admissibility of evidence is not in issue in this case. The case did not concern retention of rights of residence. The very nature of a retained right of residence requires one to consider the circumstances on divorce which will always be historic.

11. We posit a scenario in which the non-EEA national is not economically active at the date of divorce and remains so and delays making an

application which is then refused as a result of economic inactivity. The non-EEA national appeals and produces evidence at the hearing which establishes that, at that day, he or she is economically active. The problem that arises here is that there is a significant period of time from the divorce to the crystallisation of a retained right of residence. During this time the status of the non-EEA national is liable to fluctuate depending on whether at any given time he or she is economically active. The hearing date then becomes a lottery, the outcome of which depends on whether the appellant is economically active on an arbitrary date.

12. We now consider an alternative hypothesis which is whether the requirement in reg 10(6) is to be met at the date of the divorce (when the parasitic relationship between the EEA national and the non-EEA national ceases and the non-EEA national is given the opportunity to retain a right of residence in her own right). It is obvious in our view that this would accord with the way the 2006 Regulations are expressed. Indeed this appears to be the position of both parties (albeit the Secretary of State's position is that economic activity must continue beyond the divorce for a right to be retained). It is our view that it is at the point of divorce that a retained right of residence crystallises.

13. We reject the Secretary of State's submission that there is a requirement to establish continuity of economic activity. Such a requirement is not made out in the Regulations which in accordance with the Citizens Directive, refers to the retention of a right of residence. The requirement for continuity could in many cases bring about the loss of a retained right of residence. This in our view is contradictory and not contemplated in the 2006 Regulations. Retention is about keeping possession rather than losing something. We agree with Mr Justice Blake in HS in relation to continuity. At paragraph 46 he stated as follows:

> "46. Third, it sought evidence of the appellant's exercise of Treaty rights from the date of divorce to the date of the application. If this meant evidence of continuous employment we cannot see how such a requirement is consistent with EU law. If the appellant obtained a retained right of residence on divorce because of the duration of his marriage and his wife's status as a worker he did not lose it subsequently because he ceased to be employed or self employed."

14. The Secretary of State argues that unless there is a requirement of continuity there will be disparity between the non-EEA national and the EEA national. The EEA national is disadvantaged because he or she is required to show that they are economically active at the date of decision in order to acquire a right of residence. We do not accept that the comparison is of any assistance. If unable to retain a right of residence on divorce, the non-EEA national's right of residence is lost and she has no right to be here under EU law. Whereas an EEA national continues to have the right to move freely, albeit subject to conditions, and does not forever lose a right of residence following the inability to establish economic activity at a given time.

15. At this point we will consider in more detail the decision in HS which was produced by Ms Fijiwala at the hearing before us on 30 September 2015 and which is the reason for Mr Iqbal's submission that the appeal must be allowed. Mr Justice Blake at [41] decided that, having considered the penultimate paragraph of Article 13 (2) of the Citizens Directive (..." the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons...") which fails to identify who is the person required to be economically active (the EEA national or the spouse), decided that it is the EEA national and it is sufficient for the non-EEA national to be the former family member of a person who was working at the time of the divorce. His view was that there was no indication in Article 13 of the Directive that the non-EEA national has to be economically active on their own account on the termination of the marriage or indeed at all (providing the requirements of reg. 10 (5) (a), (c) and (d) are satisfied). The result of following this approach would be that the appellant in this case is not required to show that she is economically active at all and that the above discussion about reg. 10 (6) is wholly irrelevant. The Secretary of State's position is that the decision is *obiter dicta* and decided incorrectly. The appellant's position, advanced in Mr Iqbal's skeleton argument, is that HS stands as good law and as such the Secretary of State's appeal should be dismissed. His submission is an assertion. It is insufficiently developed in his skeleton argument. There is no analysis of HS or mention of the later court of appeal decision of Amos.

16. We observe that the factual matrix in HS was different. HS concerned the revocation of a residence card. The Tribunal found that, if indeed reg.10 (6) (a) is a legitimate requirement, the evidence was sufficient to establish that the appellant in that case would satisfy it. The issue was not determinative of the appeal and the conclusions of the Tribunal in respect of reg. 10 (6) are not part of the *ratio decidendi*. In any event, we are bound by the Court of Appeal in Amos which took a different view, concluding that the penultimate paragraph of Article 13 (2) of the Directive and reg 10 (6) (a) requires the non-EEA national to be economically active (see paragraph 29 and 30 of Amos at paragraph 7 of this decision). There is no doubt in our minds that Article 13(2) of the Citizens Directive deals exclusively with a non-EEA resident. It mirrors the penultimate paragraph of Article 12(2) (see below) which concerns the retention of rights on the death of the EEA national. The requirement to show that "persons" are economically active in Article 12(2) can only relate to the non-EEA resident and not the deceased EU citizen. It reads as follows;

"Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member"

17. The appellant before us asserted a retained right of residence and not a right to permanent residence. There is a need for the non-EEA national to establish continuous economic activity (which is reflected in the wording of the penultimate paragraph of paragraph 13 (2) of the directive) for a period of five years in order to establish a right to permanent residence (see reg 15 (f)).

18. To summarise, we find that a non-EEA national has to establish that he or she is economically active at the date of divorce in order to qualify for a retained right of residence. There is no requirement to establish economic activity at the date of the decision or the hearing. There is no requirement to establish continuity of economic activity.

The Appellant's Case

19. The appellant's evidence is that she was self employed at the date of the divorce (5 December 2014) and this continued to the date of the hearing (30 March 2015). The evidence she submitted in support of this comprised a letter from accountants of 23 March 2014 asserting that she is self-employed and that her tax affairs for 2013 and 2014 are up-to-date. This speaks to 23 March 2014, but not beyond. There is a self-assessment statement of March 2015 from HM Revenue & Customs. This indicated that for the years 2011/2012 and 2012/2013 there was no tax due. This speaks to April 2013, but not beyond. There is a tax return relating to the appellant for the tax year 2013 to 2014. This speaks to April 2014, but not December 2014. At the hearing before Judge Oliver the appellant produced a book showing 97 carbon copies of invoices for work she had undertaken from 11 January 2014 to 31 March 2014. There was no evidence beyond March/April 2014. All evidence pre-dated the divorce.

20. Judge Oliver found that the appellant's evidence was "unsatisfactory" but he went on to find "on balance that she was working at the relevant time such that she would be considered to have been exercising treaty rights had she been an EEA national". The judge did not identify the relevant time. Whether the relevant date is the date of the divorce or the hearing, by failing to identify it, he made an error. This is compounded by the fact that, although there was some scant evidence of economic activity, by any account it fell woefully short of establishing that the appellant was economically active at the date of divorce or indeed the date of the hearing. The error is material and we set aside the decision and remake it.

21. The appellant has failed to establish that she was economically active at the date of the divorce and the appeal falls to be dismissed. However, whether the relevant date is the divorce or the date of hearing is not material. The appellant did not seek to adduce further evidence and relied on that before the First-tier Tribunal. There was no evidence before us that the appellant was economically active at the date of the hearing before the Upper Tribunal. There was no evidence before us that she was economically active at any of the possibly relevant times. We re-make the appeal and dismiss it under the 2006 Regulations.

Notice of Decision

There is a material error of law in the decision of the First-tier Tribunal and we set it aside and remake it. The appeal is dismissed under the 2006 Regulations.

No anonymity direction is made.

Signed Joanna McWilliam Date 18 December 2015

Upper Tribunal Judge McWilliam