Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02919/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2017	**On 26 October 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ROSE [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath
For the Respondent: Mr A Otchie of Counsel (Old Square Chambers)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Ghana born on 6 July 1962, as the appellant herein.

2. She appeals the decision of the Secretary of State on 2 March 2016 to refuse to issue her with a permanent residence card on the basis of retained rights following her divorce under Regulation 10 of the Immigration (EEA) Regulations 2006.

3. The appellant's appeal came before a First-tier Judge on 26 July 2017. At that hearing the appellant was represented by Mr Otchie as she was before me. The Secretary of State was also represented by Counsel, Mr Talachi.

4. In the Secretary of State's decision it had been claimed that the appellant's marriage was one of convenience.

5. The First-tier Judge records the following concession made by the Secretary of State by Counsel:

> "Mr Talachi on behalf of the respondent confirmed at the outset of the hearing that the respondent was not pursing the suggestion that the appellant was party to a marriage of convenience under Regulation 2 of the 2006 Regulations."

6. The Judge refers to the appellant's immigration history. She had entered this country on 21 July 2003 on a visit visa and overstayed. The Judge heard oral evidence from the appellant which he summarises as follows:

> "3. The Appellant was married to [AA] on 6 Mach 2009. [AA] had been her friend from Ghana and moved to The Netherlands and became a Dutch citizen. They had a proxy marriage according to the customary practice of Ghanaian culture. They lived together after marriage when both she and [AA] worked and [AA] also worked as a self-employed person. The Respondent recognised and accepted her proxy marriage to [AA] and she was issued with a Residence Card on 24 March 2011 valid for five years.
>
> 4. The marriage was a troubled one in which the Appellant suffered from domestic violence. She travelled to Ghana on 5 April 2003 for seventeen days to 24 March (?) 2013 as reflected in her passport. She explained her difficulties to [AA]'s parents in an attempt to resolve the situation but when she returned to the United Kingdom there was no improvement and she initiated the dissolution of their customary marriage. The dissolution was registered in a high Court of Justice in Accra, Ghana and the Appellant produced copies of the official documentation. The Appellant produced evidence of [AA]'s HMRC employment record. He works extensively in the United Kingdom and exercises Treaty rights and she maintained was exercising Treaty rights at the time of their divorce in June 2014. She thought it was possible that [AA] may have told the Home Office who was residing in The Netherlands and no longer in the United Kingdom in July 2011 to attempt to frustrate her in her enjoyment of her ability to live in the United Kingdom by virtue of her status as an EEA dependant. She stated that whilst he did make regular trips to The

Netherlands they were short in duration and he maintained home and work in the United Kingdom. She maintained she had been married to [AA] for more than three years and he was exercising Treaty rights at the time of their divorce and in any event she was a victim of domestic abuse.

5. In oral evidence, the Appellant stated that she was last in contact with [AA] in 2016 and although in her passport she was allowed to travel anywhere in the EU, she stated she did not travel anywhere there and simply went back for one short trip to Ghana.

6. In cross-examination, the Appellant stated that the last time she saw [AA] was, she thought, in 2010 although later thought it was possible it was 2012. It was on that occasion that she obtained a copy of his passport although he kept the original. She did not know his whereabouts now and confirmed that she went to Ghana for about three weeks and spoke to his parents and it was a very difficult time She obtained some documents from her ex-husband via her solicitors who contacted him."

7. Having correctly addressed himself on the burden and standard of proof the Judge set out his findings as follows:

"8. I found the Appellant was credible in relation to the background of her claim and accept that she has been married to her ex-husband for a period of well in excess of three years between 2009 and June 2014. In those circumstances, it is unnecessary to make a finding that she has also been a victim of domestic violence but having heard the evidence of the Appellant, I am satisfied that she has established that she was such a victim.

9. In respect of the documents placed before me, there is evidence from HMRC in the years 2010 to 2015 showing the Appellant's ex-husband exercising Treaty rights by working in the United Kingdom and the letter from HMRC dated 7 August 2015 which I have no doubt is a genuine document shows his sources of income for the tax year ending 5 April 2015 in respect of employment in the United Kingdom. The Appellant's ex-husband's P60 for the year ending 5 April 2015 has also been produced as well as various payslips including one close to the time of the divorce namely August 2015.

10. The financial documentation provided to the Appellant by her ex-husband is not complete but is of considerable assistance in my view in establishing that the Appellant's ex-husband was, indeed working in the United Kingdom and exercising Treaty rights at the time of the divorce.

11. In all the circumstances, I find the Appellant has established to the relevant standard that she was married to her ex-husband for over three

> years (or alternatively was a victim of domestic violence) and that her ex-husband, a Dutch national, was exercising Treaty rights at the time of the divorce in June 2014."

8. The Judge accordingly allowed the appeal.

9. The Secretary of State applied for permission to appeal pointing out that it was not exactly clear on what basis the appeal had been allowed. The application had been made for permanent right of residence but the Judge appeared only to have considered Regulation 10. The Judge had erred in making only scant reference to the terms of the refusal letter.

10. While the appellant had been issued a residence card on 24 March 2011 this had been revoked on 7 December 2012 and no appeal had been lodged against this decision. The Judge had not engaged with this issue. No reasons had been given for the conclusion that the appellant had been a victim of domestic violence.

11. While the Judge had found at paragraph 10 of his determination that the documentation provided had been incomplete he found it sufficed to show that the appellant's husband had been exercising Treaty rights at the point of divorce. It was submitted that it was implicit that the Judge had not been satisfied that the appellant's husband had been exercising Treaty rights for a continuous period of five years before the divorce while the couple were married in order for the appellant to qualify for a permanent residence card. Furthermore the appellant needed to show under Regulation 10(6) that she had been a worker or self-employed person or a self-sufficient person from the date of the divorce.

12. A First-tier Judge granted permission to appeal on 18 August 2017.

13. A Rule 24 response was helpfully prepared on behalf of the appellant and filed on 11 September 2017. It was submitted that although the determination was concise it was clear that the appeal had been allowed because the appellant fulfilled the requirements of Regulation 10(5) and/or (6) of the EEA Regulations. The determination had properly dealt with the substance of the refusal. It was important to recognise that the Judge had had the benefit of a 276 page bundle of material as well as the appellant's very detailed witness statement. It was clear that the Judge had accepted the appellant's evidence.

14. On the issue of the revocation of the EEA residence card the appellant had never seen any document that revoked that card and she had indeed used it to enter the UK after returning from Ghana in April 2013. She had been let into the UK with no problems. Counsel pointed out in the response that the appellant's evidence was consistent with the material in the bundle. There was an HMRC record of her continuing to work in the UK and a passport stamp indicating that she had left Ghana on 23 April 2013. Since the evidence had not been contradicted it was entirely logical for the Judge to conclude that the appellant ultimately could qualify under

the provisions for retained rights of residency. Reference was made to **Syed (curtailment of leave – notice) [2013] UKUT 00144 (IAC)** in which it had been held that the Secretary of State had to be able to prove that notice of a decision had been communicated to the person concerned in order for it to be effective.

15. On the issue of domestic violence there were sufficient details in the appellant's witness statement for the Judge to accept that she had indeed been a victim of domestic violence and could qualify under Regulation 10(5)(d)(iv) of the 2006 Regulations. She had travelled to Ghana to explain her predicament to her husband's parents without success and the marriage had subsequently been dissolved by proxy.

16. The concession by experienced Counsel had been properly made in the light of the volume of evidence before the First-tier Judge.

17. While the financial documentation of the appellant's former husband was not complete it established that he had continued to exercise Treaty rights in the UK and reference was made to the HMRC record in the bundle.

18. Mr Nath relied on the grounds of appeal and referred to the issue of the concession. On this point I referred the representatives to the Judge's notes of the hearing where it was recorded at the outset that "marriage of convenience not pursued". Mr Nath also submitted that no findings had been made about the question of domestic violence and there was very little evidence to support such a claim.

19. Mr Otchie relied on the Rule 24 response. There clearly had been a concession at the hearing. There was a wealth of documentary evidence before the First-tier Judge and this had been referred to in the skeleton argument prepared for that hearing. In this bundle there were HMRC records in respect of both the appellant and her former husband. Counsel referred in particular in respect of the appellant to pages 72 and 73 of the bundle detailing the appellant's employment history from 2011 to the tax year ending 5 April 2015. In respect of the appellant's former husband while the record was not absolutely complete Counsel was able to identify material and pay slips for the tax year ending in April 2015. In paragraphs 15 and 16 of her witness statement the appellant had confirmed that her former husband had worked extensively in the UK and had exercised his Treaty rights in this country as was apparent from the documentation and while he had made regular trips to the Netherlands these had been of short duration and he had maintained a home and his work in the UK. I was referred to council tax records in the bundle where both appellants were named. There was also a tenancy agreement.

20. While the determination had been succinct it had dealt with the relevant issues given the concession. It was important to record that the Judge had found the appellant to be a credible witness. She had clearly suffered domestic violence and had returned to Ghana in an effort to improve matters.

21. In response Mr Nath pointed out that the Judge had accepted that the financial material was not complete. The issue of domestic violence had not been properly analysed. There was nothing apart from the appellant's witness statement. The matter had not been reported to the police. The Judge had erred in relying on incomplete documentary material.

22. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the determination of the First-tier Judge if it was materially flawed in law.

23. It is important to record at the outset that the First-tier Judge had the benefit of a considerable amount of material before him-the representatives had prepared a lengthy bundle as well as a witness statement from the appellant. Counsel then acting for the Secretary of State would have perused this material and it is clear that a concession was made at the outset of the hearing as recorded by the First-tier Judge both in the note and in his determination. I have no doubt that the concession was properly made and that the First-tier Judge was entitled to rely upon it. It would not be right to permit the Secretary of State to resile from such a concession made by experienced Counsel.

24. In respect of the employment history the Judge states in paragraph 3 of his decision that following the proxy marriage the couple lived together when both she and her former husband worked. In paragraph 4 the Judge refers to the evidence of her former husband's HMRC employment record. He recorded the evidence that the appellant's husband worked extensively in the United Kingdom and exercised Treaty rights and was exercising such rights at the time of the divorce. It is important to record that the appellant's evidence would have been subject to cross-examination and the Judge refers to the points put to the appellant in paragraph 6 of his decision. It was argued in paragraph 5 of the grounds of appeal that it must be implicit that the Judge was not satisfied that the appellant's former husband had been exercising Treaty rights for a continuous period of five years before the divorce. That does not follow. The Judge found the appellant to be a credible witness and she had given evidence she and her former husband had lived together after marriage and that both she and her husband had worked. There was extensive material from HMRC in the bundle to which the Judge makes reference. This covered the period 2010 to 2015. It was necessary to make a finding about the situation at the date of the divorce and that was all that the Judge was doing in referring to the material indicating the position at that time.

25. In relation to the issue of domestic violence it was not necessary for the Judge in the light of his findings on the primary case advanced by the appellant to deal with the issue as fully as he might otherwise have done. He accepted the evidence that the appellant had been in a troubled marriage and had suffered from domestic violence and had attempted to resolve the situation by travelling to Ghana. It was open to the Judge to accept what he had been told but as I have said, this was an alternative to his conclusion on the central point. The Judge did not make express reference to

Regulation 10(6) of the EEA Regulations. In paragraph 6 of the grounds of appeal it was said that evidence needed to be provided that since the date of the divorce the appellant had been a worker or a self-employed or self-sufficient person. It may be that this point was not expressly placed in issue by Counsel then acting for the Secretary of State in the light of the extensive documentary evidence provided. The Judge accepted the appellant's evidence unreservedly. The appellant had said in paragraph 14 of her witness statement that she had continued to work in the UK on the strength of her EEA residence card, paying her taxes and national insurance contributions and relied on her supporting bundle. On the issue of the purported revocation of the residence card, notice had not been given as required – see Syed referred to at paragraph 14 above. The Judge sensibly relied on the salient issues identified by Counsel appearing for both sides and while his determination is short it is none the worse for that.

26. Accordingly, having given careful attention to the points advanced by Mr Nath, I find that the determination of the First-tier Judge is not flawed by a material error of law and direct that it shall stand.

Anonymity Order

27. The First-tier Judge made no anonymity direction and I make none.

Fee Award

28. The First-tier Judge made a fee award in the sum of £140 which I do not disturb.

Signed Date 25 October 2017

G Warr, Judge of the Upper Tribunal