Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/11261/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 August 2017	**On 12 September 2017**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

Pokuah

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:
For the appellant: Mr E. Eluwa, Solicitor, Finsbury Law Solicitors
For the respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana who was born on 9 April 1985. She appealed against the determination of First-tier Tribunal Judge Keith promulgated on 20 December 2016 dismissing her appeal against the refusal of the Secretary of State to grant her a residence card under the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). The appellant had sought to establish a retained right of residence following her divorce from her husband, an EEA national.

2. On 27 July 2010 the appellant married Wander Medeiros de Pina, a Union citizen. Following her marriage, the appellant was issued with a five-year residence card from 4 March 2011 until 4 March 2016. This was issued on the basis that the

respondent was then satisfied that the appellant's husband was exercising Treaty rights in March 2011.

3. The marriage entered into difficulties and, on 20 August 2015, the appellant issued divorce proceedings. The First-tier Tribunal Judge found that, at the date of issue, Mr de Pina had ceased all contact with her and the couple were separated. The appellant was neither able to establish at the date of issue that he was in the United Kingdom nor that he remained as a qualified person.

4. The appellant was not able to establish a permanent right of residence pursuant to Reg.15 (1)(b) as a family member of an EEA national who had resided in the United Kingdom with the EEA national in accordance with the Regulations for a continuous period of 5 years. This was a part of the respondent's decision that was not challenged. Instead, the application made on 23 February 2016 was that the appellant had a retained right of residence under Reg.10(5). At the time of her application for a permanent residence card on 23 February 2016, neither the decree nisi nor the decree absolute had been issued.

5. The decree nisi was, however issued on 31 March 2016. The decree absolute duly followed on 16 May 2016, a copy of which the appellant forwarded to the Secretary of State. The Secretary of State considered, as she was required to do, whether the appellant had a retained right of residence pursuant to Reg. 10 (5). The decision refusing to issue a residence card was made on 30 August 2016. Reg. 10(5) provides:

> 10. (1) In these Regulations, "family member who has retained the right of residence" means…a person who satisfies the conditions in paragraph…(5).
> ….
> (5) A person satisfies the conditions in this paragraph if--
> (a) he ceased to be a family member of a qualified person 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 Reg. 6

6. It is as well to note the two distinct points in time which the regulation addresses: the *termination* of the marriage and the *initiation of the proceedings* to terminate the marriage. Secondly, the regulation creates a qualifying condition in the sense that no retained right can be acquired on the divorce unless the precondition for it (a 3-

year marriage of which one year is spent in the United Kingdom) is first met at the point when the process of divorce is initiated. I shall refer to this as the 'qualifying condition'.

7. The evidence relied upon by the appellant met all the requirements for a retained right of residence save that the appellant failed to establish that her husband was present in the United Kingdom or working beyond December 2015. In support of the application the appellant provided original payslips of her former spouse spanning 2010 to December 2015. No evidence was provided by the appellant that her husband continued to work beyond December 2015 or indeed continued to reside in the United Kingdom. Hence there was an evidential lacuna which stretched from December 2015 to 16 May 2016, the date of her divorce. The evidence, however, covered the period up to and beyond the initiation of divorce proceedings in September 2015.

8. No evidence was provided by the appellant how she obtained those payslips. Nor was an explanation given as to why payslips were not provided between December 2015 and May 2016. The appellant produced no evidence that she had attempted to contact Mr de Pina's employer for further information or that he had declined to provide it or refused to attend as a witness. There was no evidence she had sought information from HMRC or that the Revenue had refused to divulge it. It is not suggested, and rightly so, that the Tribunal should *infer* that the appellant's former husband continued to work beyond December 2015 or otherwise continued to exercise Treaty rights such as to permit him to be treated as a qualified person pursuant to Reg. 6.

9. There is no dispute that the appellant met the qualifying condition set out in a Reg.10(5)(d)(i), namely that prior to the initiation of proceedings for the termination of the marriage (20 August 2015) the marriage had lasted for at least 3 years and the parties had resided in the United Kingdom for a least one year during its duration.

10. Neither is there any dispute that the requirements of Reg. 10 (6) were satisfied. Mr Jarvis accepted that at all material times the appellant, although a Ghanaian national, was a worker, and therefore a qualified person under Reg. 10(6), had she been an EEA national. I shall refer to this as the non-EU national being a 'quasi qualified person'.

11. Accordingly, the issue between the parties is that set out in Reg. 10 (5) (a) and (b) namely whether the appellant ceased to be a family member of a qualified person on the termination of the marriage and was residing in the United Kingdom in accordance with the Regulations at the date of termination.

12. The First-tier Tribunal Judge construed Reg.10 so as to require the exercise of the relevant Treaty rights on the part of the spouse to continue up to the date of the divorce and not merely until the start of the divorce proceedings which the Judge

reasonably concluded may or may not result in the termination of the marriage. He stated:

> Applying the law to the undisputed facts, the appellant has not produced evidence that the sponsor was exercising his Treaty rights after December 2015, whether at the time of the decree nisi or the decree absolute. In addition, she has not produced any evidence of her attempts to obtain such evidence, other than asserting that the sponsor had ceased contact and that it is contrary to EEA law to require her to provide such evidence. I do not find such an assertion is correct and the appellant does not therefore meet the requirements of Reg. 10 (5).

13. There can be no dispute that, had Mr de Pina left the United Kingdom sometime between December 2015 and May 2016, he would have ceased to be a qualified person. Similarly, if he had ceased to fall within the definition of a qualified person, for example, by ceasing to be a worker, a jobseeker, self-employed or a student. It is also accepted that the burden of establishing the appellant met the requirements for a retained right of residence fell upon her.

14. Accordingly, the appellant did not meet the requirements of Reg.10(5) at the time the divorce was made absolute (and, indeed, when the decree nisi was granted in March 2016). However, the December 2015 payslips established that she did meet the requirements at the initiation of the proceedings.

15. The appellant's argument rests upon the provisions of Directive 2004/38/EC ('the Directive') and the approach to be adopted towards it.

16. Article 13 provides

> Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership
>
> 1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1). [*Article 7 deals with the right of residence of qualified persons and their spouses to reside in the host Member State.*]
> 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… decree absolute has been issued. [My underlining and my italics.]
>
> 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….

17. Once again it is as well to note the two distinct points in time which the regulation addresses: the *divorce, annulment of marriage or termination of the registered partnership* and the *initiation of the proceedings* to effect it. We also see that the Directive creates the same qualifying condition as is found in Reg.10(5) namely a 3 year marriage of which one year is spent in the United Kingdom. The qualifying condition is to be met at an earlier stage, that is, when the process of divorce is initiated. The requirement that the appellant must herself be acting as if she were a qualified person seen in Reg.10(6) is replicated in the second paragraph of Article 13(2) – the quasi qualified person.

18. The similarity between the Directive and the United Kingdom's transposition of the Directive into United Kingdom domestic law is striking. There appears to be no discernible difference.

19. In *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552, (12 May 2011) the Court of Appeal (Lord Neuberger, the Master of the Rolls; Kay and Burnton LJJ), Burnton LJ said,

> 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. Reg. 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 Reg. 14 applied, i.e. if the EEA national spouse was a "qualified person", i.e., for present purposes, a worker….
> (c) He or she is a worker…and therefore satisfies paragraph (6).
> (d) 3 years' marriage, including at least one year's residence in the UK.
>
> 31. Provided these conditions continue to be satisfied, after 5 years' continuous residence in the UK a non-EEA national will be entitled to a permanent right of residence under Reg. 15(1)(f).

20. The Court of Appeal in *Amos* did not consider that a reference to the Court of Justice was necessary or appropriate. It was *acte clair*. However, the Court of Appeal in a different constitution (Lord Dyson, the Master of the Rolls; Sullivan and Sharp LJJ) has since revisited Amos the case of *NA v Secretary of State for the Home Department* [2014] EWCA Civ 995 (17 July 2014).

21. It is to be noted that the Court of Appeal in *NA* did not treat *Amos* as binding authority since a crucial finding, the later Court of Appeal found, was made by concession. Contrary, therefore, to the long established practice that the Court of Appeal will normally follow the precedent of an earlier decision, the decision in *Amos* was no such precedent and permitted the later Court of Appeal to depart from it.

22. In *NA v SSHD* the Court of Appeal was required to consider whether a third country national ex-spouse of a Union citizen must be able to show that their former spouse was exercising Treaty rights in the host Member state at the time of their divorce in order to retain a right of residence under Article 13(2) of the Directive. Applying the *Diatta* line of authority (*Diatta* (267/83, EU:C:1985:67), there is no divorce for the purposes of Article 13(3) until decree absolute has been issued.

23. NA was a national of Pakistan who in September 2003 married KA, a German national, and the couple moved, in March 2004, to the United Kingdom. The marital relationship deteriorated subsequently. NA was the victim of domestic violence on a number of occasions. In October 2006, KA left the matrimonial home and in December 2006 he left the United Kingdom. Two years later, in September 2008, NA began divorce proceedings in the United Kingdom. The divorce became final on 4 August 2009. In other words, at the initiation of the proceedings, NA's German husband had long since departed the United Kingdom and ceased exercising Treaty rights.

24. The Court of Appeal in *NA v SSHD* summarised its view of the legal landscape in paragraph 21:

    (1) There is no express requirement in Article 13(2) that in order to retain a right of residence a third country national ex-spouse of a Union citizen must be able to show that their former spouse was exercising Treaty rights in the host Member state at the time of their divorce.

    (2) National law does impose such a requirement under the Regulations.

    (3) *Amos* is not binding authority for the proposition that the Regulations have correctly transposed the Directive, and that there is such a requirement under the latter. The issue raised in these proceedings was dealt with by way of concession in *Amos.*

    (4) We were not persuaded that the "Separation construction" of Article 13(2) adopted in *Lahyani* should be followed. *Diatta* makes it clear that there is a need for legal certainty as to when a marriage ends.

    (5) However, the decision in *Lahyani* identifies the practical problem posed by this need for legal certainty. It has the inevitable consequence that there will be a delay, of varying length depending upon the national law of the host Member state, between the initiation of divorce proceedings and the date when the decree absolute is issued.

(6) While there is some force in the Respondent's textual analysis of the title of Article 13 – in ordinary language a right is not "retained" on divorce if it does not subsist on that date – there is no less force in the Appellant's submission that [counsel's construction] accords with the need to interpret Article 13(2) in a purposive manner, so as to avoid potential abuse by Union citizens who are, for example, contesting custody or rights of access to their children in divorce proceedings, or who have inflicted domestic violence upon their third country national spouse.
(7) The case for adopting the [Appellant's] construction is strengthened once it is appreciated that the second subparagraph of Article 13(2) (like its counterpart in Article 12(2)) imposes a requirement of self sufficiency upon the third country national ex-spouse who is seeking to acquire the right of permanent residence after the divorce from (or death of) of their Union spouse.
(8) Neither party submitted that the answer to the issue raised in this appeal was *acte clair*. The answer should be the same in whichever host Member state a third country national is divorced from a Union citizen.

25. The Court of Appeal then posed this question for the ECJ to determine:

"Must a third country national ex-spouse of a Union citizen be able to show that their former spouse was exercising Treaty rights in the host Member state at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC?"

26. The matter thus came to the Court of Justice whose judgment was given on 30 June 2016 (*Secretary of State for the Home Department v NA* [2016] EUECJ C-115/15). In paragraph 30 of the judgment of the Court of Justice, the Court set out the question posed by the Court of Appeal in exactly the same terms as I have recorded in paragraph 25 above. (By then others questions had been added to the Court of Appeal's original question which was described as 'Question 1'.)

27. However, in paragraph 31 the Court of Justice sought to rephrase the question but in doing so asked a different question which it then went on to decide. Paragraph 31 reads:

The first question

By its first question, the referring court seeks, in essence, to ascertain whether Article 13(2)(c) of Directive 2004/38 is to be interpreted as meaning that a third-country national, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host Member State, on the basis of that provision, where the divorce post-dates the departure of the Union citizen spouse from that Member State.

28. This was different from the question the Court was asked to decide. The Court of Appeal was concerned to know whether the applicant was required to show that her Union citizen spouse was exercising Treaty rights at the point of divorce, not the initiation of proceedings for the divorce. The Court of Justice was asking itself whether rights acquired during the subsistence of the marriage were lost if the spouse leaves the host country prior to the divorce. This was perhaps understandable since, in NA's case, the husband left in 2006 and NA commenced

divorce proceedings in 2008: NA was never going to establish her spouse was exercising Treaty rights in 2008 when the proceedings for divorce were initiated, far less that she was able to do so at the time of the decree absolute). Hence, what follows in the judgment of the Court of Justice is tangential.

29. However, it is necessary to see whether there is anything in the Court's judgment that sheds light on the question posed by the Court of Appeal in its reference.

> 34 In that regard, with respect to Article 13(2)(a) of Directive 2004/38, the Court has previously held that, where the Union citizen spouse leaves the host Member State, in order to settle in another Member State or in a third State, before the commencement of the divorce proceedings, the third-country national's derived right of residence, on the basis of Article 7(2) of Directive 2004/38, comes to an end with the departure of the Union citizen spouse and can, therefore, no longer be retained on the basis of Article 13(2)(a) of that directive (see, to that effect, judgment of 16 July 2015, *Singh and* Others, C-218/14, EU:C:2015:476, paragraph 62).

Pausing there, this principle is uncontroversial. The Union citizen leaves the United Kingdom and his spouse's rights as the dependant of a qualifying person necessarily cease. The spouse divorces a foreign national with no EU rights to be preserved.

> 35 In such circumstances, the departure of the spouse who is a Union citizen has already brought about the loss of the right of residence of the spouse who is a third-country national and who remains in the host Member State. A subsequent petition for divorce cannot have the effect of reviving that right, since Article 13 of Directive 2004/38 mentions only the 'retention' of an existing right of residence (see judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476, paragraph 67).

This principle, too, is uncontroversial: the spouse retains nothing since her rights have already been lost.

> 36 In that context, the Court held that the Union citizen who is the spouse of a third-country national must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, up to the commencement of divorce proceedings, if that third-country national is to be able to claim the retention of his or her right of residence in that Member State, on the basis of Article 13(2) of that directive (judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476, paragraph 66).

The qualifying condition (as I have described it) must, of course, be met as this is a precondition to the acquisition of any further right.

> 48 It follows from the foregoing that it is apparent from the wording, the context and objectives of Article 13(2) of Directive 2004/38 that the application of that provision, including the right derived from Article 13(2)(c) of Directive 2004/38, is dependent on the parties concerned being divorced.
>
> 49 It follows also that an interpretation of Article 13(2)(c) of Directive 2004/38 to the effect that a third-country national is entitled to rely on the right derived from that

> provision where her spouse, who is a Union citizen, has resided in the host Member State, in accordance with Article 7(1) of Directive 2004/38, not until the date of the commencement of divorce proceedings but, at the latest, until the date when the domestic violence occurred, is contrary to the literal, systematic and teleological interpretation of Article 13(2) of Directive 2004/38.
>
> 50 Accordingly, where, as in the main proceedings, a third-country national has been the victim during her marriage of domestic violence perpetrated by a Union citizen from whom she is divorced, that Union citizen must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, until the date of the commencement of divorce proceedings, if that third-country national is to be entitled to rely on Article 13(2)(c) of that directive.
>
> 51 In the light of the foregoing, the answer to the first question is that Article 13(2)(c) of Directive 2004/38 must be interpreted as meaning that a third-country national, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, cannot rely on the retention of her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State.

30. For the reasons I have given, this reasoning falls short of deciding whether the applicant has to establish her Union citizen spouse was exercising Treaty rights a the point of the termination of the marriage because the Court of Justice was focussing at a different point in time, namely, whether the Union citizen had to be exercising Treaty rights at the moment when proceedings for the termination were initiated. That issue is a much simpler one to determine because, as we shall see, it has been clear for some time that, as in NA, if the Union citizen has long since departed the spouse would not be retaining a right but reviving a right that she enjoyed in former times.

31. Mr Eluwa also relied upon the judgment of the Court of Justice in the earlier case of *Singh and Others* [2015] EUECJ C-218/14 (16 July 2015) in which the Court of Justice considered the case of Mr Singh, one of three appellants, who was an Indian national. He arrived in Ireland on 6 February 2002 with a student visa and subsequently resided lawfully there. On 11 November 2005 he married a Latvian national who was working and residing lawfully in Ireland. Mr Singh was granted permission to reside in Ireland for five years as the spouse of a Union citizen. The couple experienced difficulties in their marriage. Mrs Singh left Ireland in February 2010 and instituted divorce proceedings in Latvia in September 2010. The divorce was pronounced with effect from 12 May 2011.

32. On 14 December 2011, following the divorce, Mr Singh applied for a permanent residence document in Ireland on the ground that he had been married to a Union citizen, and his marriage had lasted for at least three years, including one in Ireland. At that time he was either a worker or a self-employed person. In all essential details, these are the same facts as in *NA*, the crucial similarity being that the Union

citizen left the host Member State and ceased to exercise Treaty rights some months before the divorce proceedings were initiated.

33. The Minister refused the application because Mr Singh's former wife had left Ireland before the divorce.

34. Amongst others, the High Court posed the following question to the Court of Justice was the subject of the reference:

> Where marriage involving EU and non-EU citizens ends in divorce obtained following departure of the EU citizen from a host Member State where EU rights were exercised by the EU citizen, and where Articles 7 and 13(2)(a) of Council Directive 2004/38/EC apply, does the non-EU citizen retain a right of residence in the host Member State thereafter?

35. This is very much the same question as the Court of Justice asked itself in *NA*. The answer, unsurprisingly, in *NA* was the same as the Court gave in *Singh*:

> 59 In accordance with Article 13(2)(a) of Directive 2004/38, divorce does not entail the loss of the right of residence of a Union citizen's family members who are not nationals of a Member State 'where … prior to initiation of the divorce … proceedings … the marriage … has lasted at least three years, including one year in the host Member State'.

This is a recitation of the now familiar qualifying condition without the establishment of which the claim does not get off the ground. The Court of Justice continued,

> 66 Consequently, it is clear that the spouse who is a Union citizen of a third-country national must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, up to the date of commencement of the divorce proceedings for that third-country national to be able to claim the retention of his right of residence in that Member State on the basis of Article 13(2) of the directive.

Thus the Court of Justice determined

> Article 13(2) must be interpreted as meaning that a third-country national, divorced from a Union citizen, whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host Member State, cannot retain a right of residence in that Member State on the basis of that provision where the commencement of the divorce proceedings is preceded by the departure from that Member State of the spouse who is a Union citizen.

36. There is nothing in these passages that provide any support for the contention that a claimant retains her rights if the Union citizen ceases to exercise Treaty rights prior to the termination of the marriage, (at which point his non-EU spouse is not residing with the EEA national as his dependant pursuant to her EU rights).

37. However, in paragraph 63 of the Judgment in *Singh*, the following passage occurs:

> It follows that, if **on the date of commencement of the divorce proceedings** the third-country national who is the spouse of a Union citizen enjoyed a right of residence on the basis of Article 7(2) of Directive 2004/38, that right is retained, **on the basis of Article 13(2)(a)** of that directive, **both during the divorce proceedings and after the decree of divorce,** provided that the conditions laid down in the second subparagraph of Article 13(2) of the directive are satisfied.

(The second paragraph of Article 3 (2) is the familiar Reg. 10(6) requirement for the claimant herself to be a quasi qualified person.)

38. Paragraph 13(2)(a) (a 3 year marriage of which one year is spent in the host Member State) is the qualifying condition – the condition precedent – to the retained right of residence. It does not create rights. Rather, it is a bar to the creation of any right unless it is met and therefore the fact that the spouse of a Union citizen enjoyed a right of residence cannot properly be said to be retained '*on the basis of*' it. Further, the qualifying condition is directed towards *past* events (a 3 year marriage of which one year is spent in the host Member State). It does not operate *during* the divorce or *after* the divorce as paragraph 63 appears to suggest.

39. The words that I have emboldened elide the two distinct points of time that is the hall-mark of the drafting of Article 13; the retention of rights *upon divorce* and requirement to meet the qualifying condition which is to be met at the *initiation of the divorce*. That distinction is present in Article 13 as clearly as it is in Reg.10(5) where the Court of Appeal has authoritatively stated it requires the claimant to establish her EU spouse must be exercising Treaty rights at the point of divorce.

40. The Court of Justice was not intending to shift the focus of the Article 13 retention of the right of residence in the event of divorce so that the focus moved from the divorce itself to the situation that obtained at the initiation of proceedings for divorce. The qualifying condition does indeed require it to be met at the initiation of proceedings but there is nothing to suggest this is a general requirement for the operation of Article 13 as a whole.

41. Further, it was not an issue which was raised either in *NA* or *Singh.* The referring Court in Singh did not seek a response to this issue. It was not the subject of argument before the Court of Justice because the Court was concerned with the cessation of the exercise of the sponsor's Treaty rights *prior* to the divorce.

42. The Court of Justice did not answer the question posed by the Court of Appeal in its reference. Were the Court of Justice to have done so, it would have had to have made a finding that either Reg.10(5) of the EEA Regulations did not faithfully transpose the meaning of the Directive thereby rendering Reg. 10 (5) as non-compliant or it would have had to have found that Reg. 10(5) did, indeed, capture the true meaning of the Directive. In the absence of an express decision by the Court of Justice that Reg. 10(5) was incompatible with the Directive, it remains United Kingdom law.

43. The decision of the Court of Appeal in *NA v. SSHD* raising the problem did not resolve it, even tentatively, although it set out the competing contentions. Accordingly, whilst it said that the decision in *Amos* is not binding authority, it remains the most complete determination of the issue in the Court of Appeal or in the Court of Justice. It was not overruled in *NA*.

44. I have given consideration as to whether a further reference should be made by me to the Court of Justice. I decline to do so, as my decision is in large measure dependent upon my interpretation of the decisions within the Court of Appeal in *Amos* and in *NA* and, as far as I am aware, there is no authority for the procedure to be adopted when the Court of Justice has not answered the question in the reference made to it.

45. For these reasons, I dismiss the appellant's appeal and uphold the determination of the First-tier Tribunal.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
31 August 2017