



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: IA311632015

THE IMMIGRATION ACTS

At **Field House**
on **24.07.2017**

Decision & Reasons Promulgated
On **28.07.2017**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

MUZAMMIL SAEED

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Rudolph Spurling* (counsel instructed by Maxwell, Ilford)

For the respondent: Miss Julie Isherwood

DECISION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Nicholas Paul), sitting at Taylor House on 15 September 2016, to dismiss an EEA appeal by a citizen of Pakistan, born 1982.

2. The appellant was here with leave to enter as a student from 2007 – 09. On 14 March 2009 he was refused leave to enter and given temporary admission, on which he failed to report. On 15 July 2010 he married a Portuguese citizen, on which basis he was given a residence card, eventually valid till 2017. However on 29 April 2013 his wife was sentenced to (according to the decision letter) 3 years' imprisonment, for ill-treating her child or children, not by the appellant, and never his responsibility. In November that year the appellant began divorce proceedings, resulting in a decree absolute on 6 October 2014. On 27 February 2015 the appellant applied for a permanent residence card, on the

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

basis of what he said was his retained right of residence; but on 3 September that year that was refused, and his existing residence card cancelled.

3. The basis for that decision, upheld by the judge, was the appellant's wife's imprisonment, which it was said made her no longer a 'qualified person', once the sentence was passed. The EEA Regulations define a 'family member who has retained the right of residence', so far as relevant as follows (at reg. 10):

- (5) The condition in this paragraph is that the person ("A")-
 - (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
 - (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
 - (c) 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;
 - (ii) ...
 - (iii) ...
 - (iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.
- (6) The condition in this paragraph is that the person –
 - (a) is not an EEA national, but would, if the person 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).

4. The provisions in paragraph 10 (5) (d) (i) and (iv) faithfully follow the alternative conditions set out at paragraphs (a) and (c) of article 13 (2) of Directive 2004/38/EC of the European Parliament and of the Council [the Citizens Directive]. The question in issue is whether the Secretary of State was entitled to make those at (5) (a) – (c), and (6), apparently imposing additional conditions. Permission to appeal was given on the basis of *NA* [2016] EUECJ C-115/15, in which the Court of Justice of the European Communities was asked for answers to questions, including the following

- (1) 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?

5. The answer given by the Court appears at some length at paragraphs 31 – 51. The main reasoning runs as follows:

40 It is apparent, first, from the wording employed both in the heading and in the text of Article 13(2) of Directive 2004/38, that provision is made for the right of residence, to which, on the basis of that provision, a Union citizen's family members who do not have the nationality of a Member State are entitled, to be retained, in particular, in the event of divorce and that, as a consequence, when the conditions laid down in that provision are satisfied, divorce does not entail the loss of such a right of residence.

41 Second, as regards the context of that provision, Article 13(2) of Directive 2004/38 constitutes a derogation from the principle that Directive 2004/38 confers rights of entry into and residence in a Member State not on all third-country nationals, but solely on those who are a 'family member', within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national, that principle being established by the Court's settled case-law (see, *inter alia*, judgment of 16 July 2015, *Singh and Others*, C-218/14, [EU:C:2015:476](#), paragraph 51).

42 Article 13(2) of Directive 2004/38 covers the exceptional cases where divorce does not mean the loss of the right of residence of the third-country nationals concerned, under Directive 2004/38, when, following their divorce, those third-country nationals no longer satisfy the conditions laid down in Article 7(2) of that directive, and in particular, the condition of being a 'family member' of a Union citizen, within the meaning of Article 2(2)(a) of that directive.

43 It must be added, first, that Article 12 of Directive 2004/38, which covers specifically the retention of the right of residence of family members in the event of the death or departure of the Union citizen, provides that the right of residence of his family members who do not have the nationality of a Member State is to be retained only in the event of the death of the Union citizen, and not in the event of his or her departure from the host Member State.

44 Second, it is therefore clear that, when that directive was adopted, the EU legislature declined to make provision, in the event of the departure from the host Member State of the Union citizen, for specific safeguards that would be available, on account of, *inter alia*, particularly difficult situations, to his family members who do not have the nationality of a Member State, that would be comparable to those provided for in Article 13(2)(c) of Directive 2004/38.

45 Last, as regards the aims of Article 13(2) of Directive 2004/38, that provision corresponds to the objective, stated in recital 15 in the preamble of that directive, of providing legal safeguards for family members in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership, taking measures in that respect to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

6. The answer given by the Court on the facts of the case in question appears as follows:

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.

7. Mr Spurling's position is as follows. He agrees that, as from the date of her imprisonment, the appellant's wife was no longer a 'qualified person' (residing in accordance with article 7 (1) of the Directive); so neither was he. However, he points out that the individual case in *NA* was one where the appellant's spouse had left this country, rather than losing her status by imprisonment. He suggests that the *ratio* of *NA* depends on the terms of article 12 of the Directive, referring to the death of the EEA spouse, and not to her departure. Mr Spurling goes on to argue that recital 15 (see *NA* paragraph 45 above) requires legal safeguards to protect a family member in the event of the death of, or divorce from the Union citizen; so those should also be available in the case of their imprisonment.

8. **Conclusions** While the case-specific answer given at paragraph 51 of *NA* refers to the departure of the Union citizen, the rationale for it appears at 43 – 44, and 49. The EU legislature did make specific provision at article 12 for death of the EU citizen, but not for their departure, which it must have been taken to have declined to do. This however was not the whole basis for the decision.

9. My conclusions are as follows:


- (a) *NA* paragraph 42 refers to article 13 (2) as providing for an exception in cases where "following their divorce" third-country nationals no longer satisfy the conditions in article 7 (2), which must otherwise be satisfied.
- (b) Article 12 provides for rights to be retained on the death of the EU citizen, but not on their departure; it is silent as to what should happen if they are sent to prison, or in any other case.
- (c) Reg. 10 of the EEA Regulations 2016 does not deal with cases where the EU citizen has died; so there is nothing contrary to the terms or effect of article 13 (2) in the regulation's requiring (at 10 (5) and (b): see 3) continued residence as

the spouse of a 'qualified person' up to the date of the termination of the marriage.

- (d) This appellant's wife, from 29 April 2013, when she was sent to prison, was no longer residing here in accordance with article 7 (2) of the Directive.
- (e) While the judge did not consider in any detail whether or not the circumstances of that imprisonment might have amounted under reg. 10 (5) (d) (iv) (reproducing article 13 (2) (c)) to "... particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting",
 - i. there is no evidence to show that they did so for this appellant; and
 - ii. even in domestic violence cases themselves, the protection given does not outlast the departure of the EU citizen (see *NA* paragraph 51), and there is no reason for it to outlast her imprisonment in this one.
- (f) The EU legislature might have provided for rights to be retained in such circumstances, but did not; and
- (g) it follows that this appellant's rights did not come to an end 'following their divorce', but following his wife's imprisonment, and could not be retained in accordance with reg. 10 of the EEA Regulations, even read with article 13 of the Directive.

10. Since I have reached that conclusion, it follows that there is no need to consider whether the judge was entitled or not to deal with reg. 10 (5) (d) (iv) as he did, though because of the lack of any relevant evidence (see above) I have no doubt in any event that he was.

Appeal dismissed



(a judge of the Upper Tribunal)

Decision signed: 24.07.2017