Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/13407/2016

THE IMMIGRATION ACTS

Heard at Parliament House, Edinburgh
On 24 June 2019

Decision & Reasons Promulgated
On 30 August 2019

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C. M. G. OCKELTON, VICE PRESIDENT

Between

OLGA REDA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Forrest, instructed by Sterling & Law Associates LLP.
For the Respondent: Mr Govan, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant is a national of Ukraine. On 1 December 2009 she married a Polish national, Dariusz Reda. On 21 September 2010 she entered the United Kingdom as his EEA Family Member. She was granted an EEA Family Permit valid until 20 May 2016. It appears that the marriage was in difficulties and the appellant left the matrimonial home in 2014. Divorce proceedings were initiated on 9 February 2016 and the parties were divorced by decree of the Edinburgh Sheriff Court on 21 March 2016.

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2. On 16 May 2016 the appellant made an application for a residence card. The form used was form EEA(PR). In it, at page 15 of 85, the appellant has ticked the following statement:

> "I'm a non-EEA National and I am applying for a permanent residence card."

3. At section 3 of the form, asked to indicate "the basis on which you're applying for permanent residence", the appellant has ticked the following:

> "I've retained my right of residence after my EEA national family member died or left the UK, or their marriage or civil partnership ended in divorce, annulment of dissolution, and I've lived in the UK for a continuous period of five years (including time spent as a family member)."

4. In section 8 of the form "Retained Right of Residence", the appellant has entered the dates to which we have already referred, and at question 8.35, that at the date when the marriage ended, Dariusz Reda was a qualified person. That meant that she had to give details of his activity whilst the marriage continued. The details in question are given as follows in sections 9.4 – 9.6. In summary, his activity was that from November 2009 to November 2013 he was "working"; from November 2013 to the present he was "self employed". The names of two employers, covering the period November 2009 to November 2013 are given. So far as concerns self employment, the name and address of the business, and the type of business, are entered as "not known". At section 11, again, in the context of applying for a permanent residence card, the appellant sets out her relationship with her ex-husband. In section 18, again in the context of qualifying for a permanent residence card, the appellant has indicated which documents she is enclosing with the forms. At section 19, she has signed a declaration beginning with the words:

> "I hereby apply for a document certifying permanent residence/permanent residence card".

5. The application form was sent to the respondent under cover of a letter from D. Dhuheric & Solicitors of Edinburgh asserting that the appellant "has retained her right of residency in the UK and as such is entitled to be granted permeant residency as a family member who has retained the right of residence."

6. There can, we think, be no doubt that the application was for documentation confirming a permanent right of residence.

7. That application was refused on 2 November 2016. The letter of refusal accepts the appellant's claim in relation to her marriage and divorce; and accepts that the appellant's marriage subsisted for at least three years, during one of which she resided in the United Kingdom. (In reality, there is no doubt that she has resided in the United Kingdom since 2010.) The letter continues as follows:

> "You would also need to provide evidence that the EEA national was a qualified person and that you were therefore residing in accordance with the Regulations at the point of divorce. In order to do this you would need to provide evidence that the EEA national was exercising free movement rights when the decree was issued.

> You have not provided any evidence that your EEA sponsor was exercising treaty rights at the time your decree absolute was issued.
>
> In order to meet the requirements of regulation 10(6) you also need to provide evidence that since the date of your divorce you have been a worker, a self employed person or a self sufficient person. As you have submitted evidence of your own employment in the form of wage slips and an employers letter since the date of divorce, it is accepted that you meet the requirements regulation 10.6.
>
> You have failed to provide evidence that you meet the requirements of regulation 10 (5) and you have therefore not retained the right of residence following divorce.
>
> As you have not provided evidence of your former spouses treaty rights up to the point of your divorce you cannot satisfy the requirement of regulation 15.1.f.
>
> Your application was also considered to see if you qualified for permanent residence during the period of your marriage. In order to qualify you would need to demonstrate that your EEA sponsor was exercising treaty rights for five continuous years during the period of your marriage.
>
> As evidence of your EEA sponsors treaty rights you have submitted p60's dated April 2010, 2011, 2012 and 2013. These documents are sufficient to demonstrate that between April 2009 and April 2013 your EEA sponsor was employed. However this only covers a period of 4 continuous years.
>
> It is noted that you have provide a PAYE coding notice addressed to your former spouse for the years April 2013-2014 and April 2014 - 2015. These documents by themselves are not sufficient to show that your EEA sponsor was employed during these years, they would need to be supported by either wage, slips, p60's or an employers letter.
>
> Therefore you have failed to demonstrate that you have qualified for permanent residence during the period of your marriage and that you satisfy the requirements of regulation 15.1.f."

8. The appellant appealed against the refusal. The grounds of appeal, settled by the same solicitors, are as follows:

> "The appellant applied for permanent residency as someone who retained the right of residency under regulation 10(5) of the EEA Regulations 2006. The evidence provided with the appellant's application was sufficient to show that the appellant's former husband was exercising the treaty rights at the time of the divorce. The respondent did not assess the evidence on the balance of probability."

9. The appellant's appeal was heard by Judge P. A. Grant-Hutchinson in Glasgow on 5 February 2018. The appellant gave oral evidence. The judge regarded her evidence as credible. The decision is short one. The reasons given are as follows:

> "9. In coming to a decision I have to consider the Home Office's decision to refuse the Appellant's Residence Card as confirmation of a right to reside with reference to Regulation 10A of the EEA Regulations 2006. The Regulation requires the Appellant to provide evidence that her former spouse was exercising free movement rights in the United Kingdom and that her former spouse exercised Treaty rights continuously for 5 years up

to that date. The burden of proof is on the Appellant and the standard of proof is the balance of probabilities.

10. The only documentary evidence that has been produced is proof of an overpayment in the relevant years and a payment into the ex-spouse/sponsor's account. The Appellant also speaks to having seen the sponsor/ex-spouse working on one occasion during the relevant period.

11. The Appellant speaks to her relationship having broken down in 2014. It is often the case that when a relationship breaks down individuals such as the Appellant experience considerable difficulties in proving that their sponsor was exercising Treaty rights. I found the Appellant to be an entirely credible witness. Nonetheless the Sponsor's past working history, the documents lodged and her oral evidence only create the mildest inference that the Sponsor was exercising his Treaty rights continuously for the relevant period. I am constrained to refuse the appeal under the said Regulations.

12. For the reasons above, I accept the reasons given by the Respondent in the refusal to issue a Residence Card to the Appellant. The Appellant has not discharged the burden of proof and the reasons given by the Respondent do justify the refusal."

10. The appellant then applied to the First-tier Tribunal for permission to appeal. The grounds of appeal are a little surprising. After an introductory paragraph they begin as follows:

"2. The ground of appeal is that the Judge materially erred in her interpretation of Article 12(2) of Directive 2004/38/EC of the European Parliament and of the Council dated 29 April 2004 ("the Citizens' Directive"), and the corresponding Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

The legal issue in this appeal: a summary

3. The question of law to be determined by FT Tribunal ("FTT") was as follows:

"In order to demonstrate a retained right of residence under Regulation 10(5) of the 2006 Regulations, must a third-country national demonstrate that his former EEA national spouse was exercising his/her Treaty rights in the United Kingdom:

a) at the date when divorce proceedings were initiated; or

b) up until the date of decree absolute?"

4. The Appellant maintains her position as it was advanced before the FTT. In summary, she submits that, correctly interpreted, Regulation 13(2) of the Citizens' Directive requires a third-country national former spouse to demonstrate that his/her EEA national former spouse was exercising Treaty rights until the date of the initiation of the divorce proceedings.

5. It follows that the Judge materially erred in law in concluding that the Appellant had to demonstrate that her former husband was a "qualified person" (within the meaning of the Regulation 10 of the EEA 2006 Regulations) and was exercising Treaty rights continuously for 5 years up to date of the decree absolute [§9]."

11. As can be seen, paragraph 9 of the judge's decision does not mention any date in particular. Further, the argument raised in the grounds appears not to have been advanced previously. The appellant's "position as it was advanced for the FTT" is comprised in a skeleton argument which makes no mention of any distinction between the date of the initiation of the divorce and the date of the decree absolute: it refers only to "the date of the divorce". There is no trace anywhere in the file, or in the judge's determination, of the question of law to be determined by the First-tier Tribunal, as set out in paragraph 3 of the grounds. Permission was, however, granted by First-tier Tribunal Judge Mailer. He made no reference to the discontinuity between the grounds and the previous proceedings.

12. In his submissions before us, Mr Forrest said that he relied only on paragraph 13 of the grounds. That paragraph is as follows:

> "13. It further follows that the Appellant had provided satisfactory evidence of her ex-husband's exercise of his Treaty rights in the UK. For the reasons set out above, this appeal would have a real prospect of success. It also raises an important point or principle regarding the correct interpretation of the previsions of Community law."

13. Mr Forest also told us that he did not reply upon any ground complaining that the appellant should not have been refused recognition of a permanent right of residence. He said he accepted that if she had asked for permanent residence it was rightly refused.

14. The point of law that is said to be so important in the determination of this appeal was settled so far as the United Kingdom is concerned by the judgment of Singh LJ in Baigazieva v SSHD [2018] EWCA Civ 1088. In his judgment Singh LJ explores and confirms a position statement which had been submitted by the Secretary of State by reference to NA v SSHD [2014] EWCA Civ 995 and the decision of the CJEU in Singh and Others v Ministry for Justice and Equality (C-218/14) in particular. The statement forming the basis of the consent order, confirmed by Singh LJ is as follows:

> "A third country national, in order to retain a right to reside in the UK in reliance on Regulation 10(5), does not need to show that their former EEA spouse exercised Treaty rights as a "qualified person" until the divorce itself. Rather, it is sufficient to show that the former EEA spouse exercised treaty rights until divorce proceedings were commenced."

15. This issue of law, however, makes no perceptible difference to the present appeal. The problem is not, and never was said to be, that the evidence of Mr Reda's activities was different on the date of the initiation and the date of the finalisation of the divorce in 2016. The problem is that there was no sufficient evidence of his activities after 2013. So the position is that not only was the point raised by the grounds not in issue in the present appeal, nor was it dealt with by the judge; it could not have made any difference in any event. It is true that the letter of refusal specifically refers to the date of the decree absolute, and that Judge Grant-Hutchinson's decision endorses the conclusion reached by the Secretary of State: but,

in the circumstances, it is very difficult indeed to see why Judge Mailer granted permission to appeal.

16. Mr Forrest's submissions were directed to showing that the evidence adduced to the Secretary of State with the application, and again before the judge, was sufficient to establish that the appellant had a right to continue to reside in the United Kingdom. That may be so, but, as Mr Govan pointed out, the application was for recognition of a permanent right of residence; Mr Forrest had accepted that such a claim could not succeed; and the appellant had not made any other application, although she was at liberty to do so.

17. We agree. Insofar as the judge may have thought, in line with the letter of refusal, that the appropriate date was the date of the decree absolute rather than that of the initiation of the divorce, she erred in law. If she did so, her error is immaterial, because, on the evidence before her, her conclusion would necessarily have been the same even without the error. It is now conceded that the Secretary of State's decision refusing the appellant's application was the correct response to the application that was made. We dismiss the appellant's appeal to this Tribunal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 12 August 2019