Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11126/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 October 2013	**On 24 October 2013**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

AWA SANGARE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C McNicholas, Counsel, instructed by Calices Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 20 January 1987, is a national of the Ivory Coast. In 2003, she married a French national, Mr Kone and they moved to the United Kingdom in or around 2006. In January 2008, following an application made some time in 2007, she was issued with a

residence card as a family member of an EEA national, valid until 24 January 2013. It is accepted on behalf of the respondent that at that time her husband was a worker exercising treaty rights and that the marriage was a genuine one.

2. On 12 January 2013 the appellant applied for a permanent residence card as confirmation of a right to reside in the United Kingdom. She would be entitled to such a card, in accordance with Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 if she could establish that she had been "a family member of an EEA national… who has resided in the United Kingdom with [that] EEA national in accordance with these Regulations for a continuous period of five years". Although by this time, the appellant and her husband had apparently separated, it is not now in dispute that at the time of this application, he was in the UK and the parties, although separated, had not finalised a divorce. Accordingly, if the appellant could show that there was a five year continuous period in which she had been living with her husband while he had been living in this country (in accordance with these Regulations) she would have acquired a right of permanent residence and thus would be entitled to a permanent residence card as confirmation of her right to reside in this country.

3. The respondent refused her application on 24 March 2013, and the refusal letter is dated the same date. The basis of refusal was that the appellant's husband had been unemployed for more than six months, in circumstances where he was not seeking work. Accordingly, the appellant had not been living with the EEA national who had been residing in this country "in accordance with these Regulations for a continuous period of five years" (because there was a gap within the five year period when he had not been exercising his treaty rights) and so she was not entitled to a permanent residence card.

4. The appellant appealed against this decision, and her appeal was heard before First-tier Tribunal Judge Amin, sitting at Hatton Cross, on 28 June 2013, but in a determination promulgated on 15 July 2013, Judge Amin dismissed the appeal.

5. The appellant now appeals to the Upper Tribunal, permission having been granted by Upper Tribunal Judge Macleman on 4 September 2013. The basis upon which the appeal is now put is that even though the First-tier Tribunal had found that there had been a period within the five years when the appellant's husband had not been exercising treaty rights by working, nonetheless during that period he had been "self-sufficient", which is a category of "qualified person" recognised within the Regulations, and thus, even if not working throughout that period, had still been residing in this country "in accordance with these Regulations" during the period when he was not working. The basis upon which it is argued that the judge should have considered that he was self-sufficient was that during that period the appellant was working and thus providing

sufficient income on which the couple could be adequately maintained without recourse to public funds.

6. Before me, the way in which the cases of the respective parties were put can be summarised as follows. On behalf of the appellant, it was claimed (as already briefly summarised above), that because the appellant's husband had been self-sufficient during such period as he was not working (because the appellant had been working throughout that time) he was at all material times exercising treaty rights during his residence in this country and thus the family member had been the family member of an EEA national exercising treaty rights in this country for a continuous period of over five years. She should thus be entitled to a permanent residence card.

7. On behalf of the respondent, Mr Deller accepted that the evidence showed that the appellant had been residing in this country as the family member of her husband, and that status did not change following separation. At the time of application, and at the time of the respondent's decision and indeed Judge Amin's decision also, the appellant had not yet been divorced, and it was now well established that an applicant would not cease to be a family member of an EEA national until a divorce was finalised. Also, Mr Deller did not seek to suggest that the appellant's husband had left the UK, but was content to make his submissions on the basis that he was still in this country.

8. The issue was whether or not the appellant had acquired a right of permanent residence through being the family member of an EEA national and resident in this country during a continuous five year period while he was exercising treaty rights. If she had, then she would have acquired a permanent right of residence. If she had not, however, then she would not. In this case, it might well be that after the temporary period of unemployment as found by Judge Amin, the appellant's husband had again begun to exercise his treaty rights by working. If this was the case, then on divorce, by virtue of Regulations 10(5) and (6) of the 2006 Regulations, this appellant might well be able to argue that she is entitled to reside here under these Regulations, but that was not the issue which this Tribunal had to determine today. Nor was the Tribunal concerned with the appellant's Article 8 position; it was not whether or not the appellant should be allowed to remain here which was the focus of this appeal, but whether she was entitled to a permanent right of residence pursuant to the 2006 Regulations.

9. Mr Deller accepted that if during the period of unemployment identified by Judge Amin, the appellant's husband had been self-sufficient, then in those circumstances he would have been exercising treaty rights. However, the issue before this Tribunal now was a narrow one, and it was whether in order to establish self-sufficiency, it was permissible to rely on income from the appellant, who would not have had any right to work during this period except as the family member of a person exercising

treaty rights. Mr Deller's contention was that this would not be permissible.

10. Mr Deller put his argument in the following way. The basis upon which the appellant would have been entitled to work was that she was the family member of a person exercising treaty rights. If the appellant was not working (as found by Judge Amin on the evidence before him) then unless he was exercising treaty rights in some other way, such as by establishing that he was self-sufficient, the appellant would not be the family member of a person exercising treaty rights. Accordingly she could not lawfully work. If she could not lawfully work, then her income should not be taken into account when assessing whether or not her husband was "self-sufficient". As he put it, the appellant was relying on a circular argument but could not be allowed to rely on what the courts had previously referred to as "impermissible circularity". Without the benefit of the income which was derived from the appellant's working, her husband would not be self-sufficient, and so this income could not be relied upon.

11. Mr Deller recognised that in practical terms it was highly unlikely that enforcement action would have ever been taken to prevent someone such as the appellant working in circumstances such as these (for example when an EEA national took an extended time off work in order to bring up the couple's children) but that did not alter the core fact which is that if, technically, the appellant's husband could not be said to have been exercising treaty rights, then for the reasons already set out, she would not be entitled to a permanent residence card now.

12. On behalf of the appellant, Mr McNicholas agreed that the core issue which had to be determined by the Tribunal was whether in these circumstances, the appellant's earnings could be relied upon. If they could, and the appellant's husband, or rather the couple, could be said to be self-sufficient, then he would have been exercising treaty rights throughout the relevant period and the appellant would be entitled to permanent residence in this country.

13. This decision which I have been asked to reach is not dissimilar from trying to determine which came first, the chicken or the egg, and it is a question which I would have to determine without the benefit of any direct authority, although both Mr Deller and Mr McNicholas did seek to rely upon authority which they said was relevant, albeit not direct. It may be (although this was not argued before me) that in order to determine this issue I would have had to consider whether or not the grant of the five year temporary residence card itself gave the appellant the right to work lawfully in the UK until revoked, such that her argument was not a circular one. However, in my judgment, for reasons which I canvassed during the hearing and which I set out below, it is not necessary for me to determine this point.

14. My reason for considering that the very difficult question posed does not need to be determined in this case is because until this hearing, the requirements under the Regulations before one can be properly considered to be "self-sufficient" have not been addressed.

15. Under Regulation 6(1) a "qualified person" is defined as follows:

16. "'**Qualified Person'**

> 6.-(1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as –
>
> (a) a jobseeker;
>
> (b) a worker;
>
> (c) a self-employed person;
>
> (d) a self-sufficient person; or
>
> (e) a student"

17. Accordingly, as is accepted on behalf of both parties, if during the period when he was not working, and not seeking work, the appellant's husband was "self-sufficient" he would still be exercising treaty rights in this country. However, as I pointed out to the parties during the course of the hearing, under Regulation 4(1) a "self-sufficient person" is defined as follows:

> "4-(1) In these Regulations - …
>
> (c) 'Self-sufficient person' means a person who has –
>
> (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
>
> (ii) comprehensive sickness insurance cover in the United Kingdom."

18. I asked Mr McNicholas to take instructions as to whether it would be or could be argued on behalf of the appellant that during the period when he was not working, her husband had in place comprehensive sickness insurance cover in this country. Having taken instructions, Mr McNicholas told me that there had been no such insurance cover.

19. In those circumstances, whether or not the appellant should be entitled to rely on her income for the purpose of establishing that at that time her husband was "self-sufficient", he could anyway not be treated as self-sufficient in accordance with the Regulations. It follows that there was a period during the period relied upon when the appellant's husband was

not exercising treaty rights in this country, because during that time he was neither a worker nor a self-sufficient person as defined within the Regulations, and therefore the appellant could not establish that she had been the family member of an EEA national exercising treaty rights in this country for a continuous five year period.

20. It follows that whether or not Judge Amin should have considered whether or not the appellant's husband was self-sufficient during the period when he was not working could not have had a material difference to the outcome, because, in the absence of the necessary insurance cover, he could not have been found to be "self-sufficient" as this is defined within the Regulations.

21. Accordingly, while the appellant might still, following the finalisation of her divorce, be entitled to rely upon other parts of the Regulations (in particular Regulations 10(5) and (6)), so far as the application which is before me is concerned, her appeal must fail, and I so find.

Decision

There being no material error of law in the determination of the First-tier Tribunal, this appeal is dismissed.

Signed: Date: 17 October 2013

Upper Tribunal Judge Craig