Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/48469/2013
IA/48472/2013

THE IMMIGRATION ACTS

Heard at Field House

On 5th September 2014

Determination Promulgated
On 12th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

MRS VICTORIA AHMED-CUNHA (1)
MISS ADAEZE NWOSU-CUNHA (2)
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu of Moorehouse Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The first appellant is a citizen of Nigeria born on 30th September 1975; the second appellant is her daughter who was born on 12th April 2010 in Portugal. I understand she is also a citizen of Nigeria, but it seems likely

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she is also entitled to Portuguese nationality as she was born in Portugal, her father is a Portuguese citizen and her parents were married at the time of her birth. The first appellant was issued with a residence card on 21st December 2010 as the wife of Mr Marco Paulo Dos Santos Leite Da Cunha, a citizen of Portugal who was exercising Treaty rights as a worker in the UK. She divorced Mr Cunha on 16th July 2013. The appellants applied for permanent residence and residence cards as evidence of this on 17th August 2013.

2. The applications were refused on 16th November 2013 on the basis that the first appellant did not qualify for a retained right of residence on her divorce. Her appeal against the decision was dismissed on the papers by First-tier Tribunal Judge Hague in a determination promulgated on the 27th April 2014.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers on 14th July 2014 on the basis that it was arguable the First-tier Tribunal had erred in law by not properly considered evidence before it that showed that the ex-husband of the first appellant was a qualified person working in the UK at the time of the termination of the marriage.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. At the start of the hearing I asked Mr Nath for a copy of the full refusal letter dated 16th November 2013 as Judge Hague had recorded he had determined the appeal with reference to only alternate pages of the refusal letter, and I could not find a complete copy on the file.

6. Mr Nwaekwu relied upon the grounds of appeal. These contend that Judge Hague erred in law because whilst correctly identifying the legal test under Regulation 10(5) of the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations) he failed to apply the facts of this case to the relevant Regulation. Evidence was clearly in the bundle which showed that the appellant was married for more than three years; that the couple had resided in the UK for more than a year; and that the appellant's husband had been a worker at the time of termination of the marriage in July 2013 as there were payslips relating to this month in the bundle. The appellants were thus entitled to succeed in their appeal that the first appellant had a retained right of residence in the UK on termination of her marriage.

7. I put it to Mr Nath that it was clear that Judge Hague had erred in making a wrong factual finding that the appellant had not provided payslips for her husband after 2010 when at pages VAC 2, 3, 4 and 5 of the appellant's bundle there were payslips for the appellant's husband from 2012 and 2013. This evidence was clearly material as these payslips showed that the appellant could meet the test for a retained right of residence at Regulation 10(5) of the EEA Regulations. Mr Nath agreed that this was a material error of law.

Conclusions – Error of Law

8. I find that Judge Hague had erred in law as he had failed to give adequate reasons as to why the appellant did not qualify under Regulation 10(5) of the EEA Regulations given the evidence before him.

9. I set the determination of Judge Hague aside with no retained findings of fact.

Evidence & Submissions – Re-making

10. Mr Nwaekwu called the first appellant to give evidence. She gave her full name and address. She adopted her statement, signed it, and confirmed that it was true and correct. In summary in her statement she says as follows. She married Mr Da Cunha on 3rd April 2008. She was granted an EEA residence permit on 21st December 2010. She had lived with her spouse for more than four years when their marriage was terminated by divorce. She has provided the marriage certificate and the divorce certificate dated 16th July 2013. She has provided evidence he was a worker at the date of divorce and before this time, which is attached to her statement. If more evidence were needed the respondent ought to have contact HMRC for evidence regarding her former husband's employment/ self-employment. She had clearly lived in the UK with her husband for more than a year, and sets out evidence (in the form of P60s and payslips) that she herself has worked in the UK for a continuous period at King George Hospital from April 2007 to the present time.

11. In oral evidence the appellant added that she believed that Mr Da Cunha was working in security between October 2010 and April 2012 but he was not a good communicator and was a careless person so she did not have the documents or any more details.

12. Both parties and I were agreed that the first appellant qualified for a retained right of residence under Regulation 10(5) of the EEA Regulations for the reasons set out below. Submissions were therefore confined to the issue as whether the first appellant qualified for permanent residence under Regulation 15 of the EEA Regulations.

13. It was agreed by both parties that the evidence for Mr Da Cunha's work in the UK as included in the appellant's bundle is as follows: 2008 (3 payslips), 2009 (3 payslips and a P60), 2010 (P60 and 3 payslips). There was then a gap where there was no evidence between October 2010 and April 2012. There was a P60 for April 2012 to April 2013 with a payslip for 2012 and 3 payslips for May, June and July 2013.

14. Mr Nwaekwu argued that it was not the appellant's husband's history of work which needed to be continuous for the five year period for the appellant to have obtained permanent residence under Regulation 15 of the EEA Regulations: it sufficed if she herself had worked continuously because of what was said in Regulation 10(6) and because she had a retained right of residence. In the alternative Mr Nwaekwu argued that

he relied upon the case of Amos v SSHD 2011 EWCA Civ 552 in which he said it was found that the respondent should make checks on HMRC records with respect of the continuous employment of a divorced husband. On this basis the decision of the Secretary of State, with respect to the permanent right of residence, would be not in accordance with the law for failure to make these checks. Unfortunately he did not have a copy of Amos to refer us to at the Tribunal hearing.

15. Mr Nath argued that Regulation 10(6) of the EEA Regulations did not have the affect argued for by Mr Nwaekwu. He submitted that it was clear from Regulation 15(1)(f)(i) of the EEA Regulations that the appellant must show continuous exercising of Treaty rights which up until her divorce must be by way of showing her husband was exercising Treaty rights. The evidence before the Tribunal did not suffice due to the gap between October 2010 and April 2012, and so she could not succeed in her claim to be entitled to permanent residence.

16. At the end of the hearing I reserved my determination.

Conclusions

17. The first appellant is entitled to a retained right of residence under Regulation 10(5) of the EEA Regulations. She was the wife of qualified person on termination of her marriage. She was married to Mr Da Cunha, a Portuguese national, on 3rd April 2008 and divorced him on 16th July 2013, as is clear from the decree absolute at page VAC 1 of her bundle. She has produced payslips showing that Mr Da Cunha was working for Alpha Response 2004 Ltd in May, June and July 2013. The appellant therefore satisfies Regulation 10(5)(a) and (b) of the EEA Regulations.

18. The appellant is clearly a worker herself as she has provided evidence of her continuous employment with BHR Hospitals NHS Trust from April 2009 (P60s and payslips), and thus satisfies the requirement at Regulation 10(5)(c) by reference to Regulation 10(6) of the EEA Regulations.

19. It is clear that the marriage lasted for over five years (from the divorce certificate), and that the couple lived in the UK for more than a year during their marriage – see the evidence of their both working in the UK which is continuous for the appellant and covers all but the period but October 2010 to April 2012 for her former husband. There is also evidence in the form of utility bills and bank statements for the appellant and two joint tenancy agreements. I am therefore that the appellant satisfies Regulation 10(5) (d) of the EEA Regulations.

20. As a result of these findings the first appellant is entitled to a retained right of residence, and a residence card to reflect this.

21. The first appellant also argues that she is entitled to a permanent right of residence under Regulation 15(1)(f) of the EEA Regulations. There is

no doubt that she has been in the UK for five years and that at the end of this period she was a family member who had as retained right of residence as is set out above.

22. However to have resided in the UK for five years in accordance with the EEA Regulations as is required at Regulation 15(1)(f)(i) she would have to show that up until 16th July 2013 she was the spouse of Mr Da Cunha and that he was exercising Treaty rights continuously during that period as during this period this was the basis of her EEA right to remain. I believe that this is consistent with the approach taken in Samsam (EEA revocation and retained rights)[2011] UKUT 165.

23. I do not accept that Regulation 10(6) of the EEA Regulations makes any difference to this, as 10(6) is a qualifying part of the conditions for a retained right of residence. It is clear from paragraph 29(1) of the Court of Appeal judgement in Amos that the appellant must show at all times up until her divorce that her husband was continuously exercising Treaty rights if she wishes to rely upon this period to satisfy the five years at Regulation (1)(f) of the EEA Regulations. It is also clear that the Court of Appeal found that there was no duty on the Home Secretary to make enquiries with other departments, such as HMRC, about information they might hold which would assist the first appellant in proving her former husband was working, see paragraph 42 of the judgement in Amos.

24. I therefore conclude that the appellant can show she has resided in accordance with the EEA Regulations since April 2012 on the basis of the P60 and payslip evidence she has provided about her former husband's work and thereafter on the basis of her own work as a someone with a retained right of residence, but that this is clearly not long enough to meet the five year qualifying period set out at Regulation 15(1)(f)(i) of the EEA Regulations.

25. There is no doubt that the second appellant is the daughter of the first appellant and her former husband (her British birth certificate is in the respondent's bundle) and therefore is her family member as defined under Regulation 7(1)(b) of the EEA Regulations and thus is entitled to a residence card on this basis.

Decision

26. The decision of the First-tier Tribunal involved the making of an error on a point of law.

27. The decision of the First-tier Tribunal is set aside.

28. The decision is re-made allowing the appeal of the first appellant on the basis she is entitled to a retained right of residence under Regulation 10(5) of the Immigration (EEA) Regulations 2006 and the second appellant on the basis that she is a family member under Regulation 7(1)(b) of the Immigration (EEA) Regulations 2006.

Deputy Upper Tribunal Judge Lindsley
8th September 2014

Fee Award

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I decline to make a fee award as key documents were only provided at the appeal stage in the appellant's bundle submitted to the First-tier Tribunal and no representations were made requesting a fee award by her representative.

Deputy Upper Tribunal Judge Lindsley
8th September 2014