



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/05440/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 20 February 2015

On 27 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SIVATHARSINI SIVASUNTHARAM

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr M Blundell, instructed by M Ns' Law LLP

DECISION AND REASONS

1. Mrs Sivasuntharam is a citizen of Sri Lanka whose date of birth is recorded as 19 April 1980.
2. On or about 14 November 2013 Mrs Sivasuntharam made application for a permanent residence card on the basis of retained right of residence in the United Kingdom following divorce. The application made to the Secretary of State specifically stated that the reason being contended for entitling Mrs Sivasuntharam to that retained right was because of divorce on 16 August 2013.

3. On 11 January 2014 the Secretary of State decided to refuse the application having regard to Regulation 15(1)(f) of the Immigration (European Economic Area) Regulations 2006 with reference to Regulation 10(5) and 10(6).
4. Mrs Sivasuntharam appealed and her appeal was heard on 10 November 2014 by Judge of the First-tier Tribunal McDade sitting at Stoke. He allowed the appeal specifically making reference to Regulation 15(1)(f)(i) and (ii).
5. Not content with that decision, by Notice dated 21 November 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal. The grounds submitted that the judge materially misdirected himself because in order to retain a right of residence as the former partner of an EEA National following divorce it was a requirement that Regulations 10(5) and (6) were also met.
6. On 6 January 2015 Judge of the First-tier Tribunal Tiffin granted permission thus the matter comes before me.
7. There was no dispute that the judge erred in this case but the error of law came about because the Secretary of State in making the decision did so by reference to Regulation 15(1)(f) in consequence of the nature of the application that was made in the first place.
8. Regulation 15(1) provides:

The following persons shall acquire the right to reside in the United Kingdom permanently -

....

(b) *a family member of an EEA National who is not [herself] an EEA National but who has resided in the United Kingdom with the EEA National in accordance with these Regulations for a continuous period of five years;*

....

(f) *a person who -*

(i) *has resided in the United Kingdom in accordance with these regulations for a continuous period of five years; and*

(ii) *was, at the end of that period, a family member who has retained the right of residence.*
9. The definition of a family member who has retained the right of residence appears at Regulation 10 and it is there that one finds those matters in respect of which concessions were made by the Secretary of State as appears at paragraph 3 of the Decision and Reasons of Judge McDade. The entire focus of the appeal before Judge McDade was on the remaining issue in respect of which no concession was made which the judge defined

as being, “Whether or not [Mrs Sivasuntharam] was required to exercise treaty rights herself in the United Kingdom.”

10. Mr Tarlow for the Secretary of State accepted that he could not go behind the concessions that were made by the Presenting Officer in the First-tier Tribunal. He was right to take that position given the guidance in **NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856**.
11. However, the error in the Statement of Reasons was that the judge considered the appeal under the wrong part of Regulation 15. The Notice of Decision pointed to Regulation 15(1)(f) and the Presenting Officer did little to assist the Judge in not falling into error. However on the facts of the case Mrs Sivasuntharam was entitled to succeed under Regulation 15(1)(b).
12. Mrs Sivasuntharam married on 28 November 2007 and divorced on 16 August 2013. Those were dates that were not in dispute. The Secretary of State had conceded that Mrs Sivasuntharam’s former husband was a qualified person for five years and that both he and Mrs Sivasuntharam had been in the United Kingdom during the relevant period. Without more therefore the appeal was to be allowed under Regulation 15(b) without any need to consider any other factors. In the circumstances the judge was right to allow the appeal under Regulation 15(1) though not under (f) but rather under (b). The error of law in the circumstances is not material but if it is then through an abundance of caution, in the alternative I make plain that I would have remade the Decision so as to allow the matter under the Regulation 15(1)(b).

Notice of Decision

The Decision and Statement of Reasons of the First-tier Tribunal contained no material error of law. In the circumstances the appeal to the Upper Tribunal is dismissed. For the avoidance of doubt, the decision of the First-tier Tribunal is affirmed.

Signed

Date 26 February 2015

Deputy Upper Tribunal Judge Zucker