IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36140/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 August 2015	**On 26 August 2015**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RENA PETULA BOGLE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Adophy, Rana & Co Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an application challenging a determination of First-tier Tribunal Judge Colvin promulgated following a hearing at Taylor House on 8 October 2014. Before the Tribunal today Mr Adophy, a representative who appeared before the First-tier Tribunal, has attended to represent the appellant. Mr Tufan is here on behalf of the Secretary of State.

2. The First-tier Judge correctly noted that the immigration decision under challenge was a refusal to grant a permanent right of residence under the Immigration (EEA) Regulations 2006, dated 7 August 2013. The

appellant's case is set out at paragraphs 3-6 of the determination followed by details of the documentary evidence provided, submissions, and statement of law.

3. The judge accepted that the appellant continued to live with her husband from their marriage in August 2006 until about September 2010 when he left the matrimonial home without giving her any warning and with no forwarding address. The judge also found that there was no reason to doubt the appellant's evidence that she has been unable to discern the whereabouts of her ex-husband since he left and she divorced him in June 2013.

4. In relation to the issues under the EEA provisions, the judge sets out the findings at paragraphs 13 and 14 of the determination. Under paragraph 13 the judge finds "it is accepted that the appellant is unable to show that her ex-husband, the EEA national, has been exercising treaty rights during the continuous five years so as to bring her within Regulation 15(1)(b) of the EEA Regulations. It is therefore necessary to consider in the alternative whether she is able to show that she is a family member who has retained the right of residence so as to fall within paragraph 15(1)(f) of the Regulations. However, under paragraph 10(5)(a), a family member who has retained the right of residence, the appellant still has to show that she ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of marriage. This means she either has to show that her ex-husband continued to exercise treaty rights or had a permanent right of residence at the time of the divorce. As mentioned above, she is unable to show this for the reasons given".

5. The judge therefore concludes in paragraph 14 that she was unable to find that the appellant had shown she is entitled to a permanent right of residence under the EEA Regulations. The judge thereafter makes a comment regarding whether consideration should be given to an application being made to the Home Office under Section 40 of the UK Borders Act.

6. In paragraph 9 of the determination the judge does record that in the submissions that were made by Mr Adophy is was said that Regulation 10(5)(d) (iv) may apply on the basis that the continued right of residence of a person is warranted by 'particularly difficult circumstances'. Mr Adophy told the judge he was unsure whether a request had been made under section 40 of the UK Borders Act for information on the sponsor from HMRC.

7. The basis of the challenge to the determination is set out clearly and succinctly and asserts that notwithstanding that point being raised with regard to Regulation 10(5)(d)(iv) the judge failed to deal with it and to set out findings with regard to whether 'particularly difficult circumstances' as contemplated by the Regulations existed. There is also a challenge to the

decision and consideration under Article 8 which I will put aside for the moment.

8. Permission was initially refused by a Judge of the First-tier Tribunal but granted by Upper Tribunal Judge Reeds on a renewed application on 18 May 2015.

9. Regulation 10(5) sets out the requirements for a family member to attain a right of residence.

10. Regulation 10(5) states a persons satisfies the condition in this paragraph if….., and then sets out various criteria that have to be met. It is asserted that the judge did not deal with any element or the required elements of that paragraph. Regulation 10(5)(a), for example, requires a person to show that they satisfy the conditions if they ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage, which was in June 2013. The judge specifically found in paragraph 13 that that had not been proved to be the case on the basis of the evidence made available to the tribunal and the limited evidence made available to the appellant relating to her former husband's circumstances.

11. The difficulty for the appellant and for Mr Adophy in relation to this matter, is that the appellant did not have the benefit of having her husband come along to give evidence or the benefit of being able to have information to hand to the judge to prove her husband's status in the United Kingdom at the relevant time.

12. The tribunal spent some time discussing which of the relevant provisions the appellant was able to satisfy, leading down to Regulation 10(5)(iv). If it was the case that the requirements in 10(5)(a)(i) – (iii) could be satisfied and the only issue at large was whether the appellant was able to succeed on the basis of (iv), the existence of particularly difficult circumstances, then it has not been established on the basis of the discussions we have had today that any error the judge may have made in relation to this matter in not specifically setting out findings in relation to that paragraph are in fact material.

13. It is submitted that the ‘particularly difficult circumstances’ this appellant faced relate to the fact that she was unable to get any information relating to her husband's circumstances. That is clearly not the type of situation envisaged by the author of the provisions and indeed there is an example, and I appreciate it is only an example, within the provision itself where it is said “such as the family member has been a victim of domestic violence while the marriage or civil partnership was subsisting”. It must be remembered that what is being proposed is that the person has the ability to succeed, to obtain status under European law by relying on such a provision, when they are unable to attain that status by being able to demonstrate that they can satisfy any other requirement(s) of the Regulations. The burden is upon the appellant to prove.

14. It was submitted today on behalf of the appellant that in fact a request was made under Section 40 to the Secretary of State asking for information relating to the appellant's husband's circumstances. It is accepted that not all the details relating to that individual, such as the national insurance number, could be provided but I accept that is probably the reality of the situation where an individual has no knowledge of such facts because information of that nature would be with the former spouse.

15. It has not been established that any request was made to HMRC. The request was made to the Secretary of State. It is said the Secretary of State failed to respond to that request and this in some respect is a situation identical to that faced by the appellant in the case of **Amos and Others [2011] EWCA Civ 552** in which the Court of Appeal gave consideration to the position of a divorced spouse where difficulties existed in relation to obtaining information and consideration of whether there was a positive obligation upon the Secretary of State to assist by obtaining such information as may exist from those such as HMRC to assist an appellant in proving that they were entitled to status.

16. That was an issue that had been at large within the jurisdiction following a case in another jurisdiction, not immigration and asylum, which seemed to suggest that there was such a positive obligation and in fact a shared burden of proof between the Secretary of State and the appellant in that particular case. The Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question of whether a retained right existed. The Court of Appeal rejected the argument that there was a shared burden of proof and left the responsibility for proving the allegation fairly and squarely upon the person making such an allegation. The Court of Appeal held that there was no authority for the contention that the department concerned had a duty to obtain information from other government departments and that the Home Office could not be expected to ask HMRC or the Department of Work and Pensions whether the EEA national was working or was self-employed.

17. Within **Amos** it was considered and accepted that if a request for information had been made of the Home Office, the Home Office could not be forced to obtain information and if a direction was sought it would only yield the information which the Home Office happens to hold itself. Notwithstanding that being the official position it is known that in some cases the Secretary of State for the Home Department will make a request to ascertain whether such information is held by the Inland Revenue to assist cases, although there is a limited number of such applications/requests available. What the Court of Appeal recognised in **Amos** is that if such information was not forthcoming there was the possibility to seek a direction under the First-tier Tribunal Procedure Rules, or to seek a witness summons if the location of the EEA national was known.

18. It is said today that no response was received from the Secretary of State, yet no decision was made to make any form of application or to make use of the remedies that exist within the judicial system to provide an effective remedy against the Secretary of State in relation to her silence in response to the request made.

19. The position, therefore, is that this is a matter in which it was known there was no information from the EEA national. It is said a request was made to the Secretary of State. It is said the Secretary of State failed to respond yet no further application was made. It is quite properly accepted today by Mr Adophy that with hindsight, the benefit of the crystal clear vision that hindsight gives you, that in fact such an application should have been made.

20. The other issue to note is that at the hearing before Judge Colvin no application was made to adjourn or to seek a direction and no indication given that the appellant was other than ready to proceed with the hearing before the judge, albeit on the limited evidence that was made available.

21. The question of whether the lack of such evidence can form 'particularly difficult circumstances' has not been made out. The case of **Amos** was examining a similar situation and did not find that in the event an individual could not obtain information that there was an alternative right permitting that an individual to succeed under Regulation 10(5)(iv) on this basis. Indeed Mr Adophy's response when asked whether the Court of Appeal had made such a finding was to say that the Court of Appeal had "not been so generous".

22. In that submission he is absolutely right because it has not been established, and I accept there is no authority on the point, that not having such information and/or the Secretary of State not responding to the request, is sufficient to satisfy the definition of 'particularly difficult circumstances'. It is a question of fact in each case and no hard and fast rules can be set as to what may constitute particularly difficult circumstances or not, but on the facts of this case it as not been established that such circumstances exist. The specific wording suggests a stringent test, not just 'difficult' but 'particularly difficult'.

23. In conclusion two points arise. First, the judge did not find that the necessary status of the EEA national had been established and if that shows that Regulation 10(5)(a) could not be satisfied, or any of the relevant parts of 10(5) that are required before moving on to (iv), the judge had dealt with the submission made in relation to 10(5). If the matter was that of 10(5)(d)(iv) on the facts before the judge it has not been shown that if an error has been made in not setting out findings in relation to this issue, that it is material to the decision to dismiss the appeal under the Regulations in any event.

24. The second ground of challenge relates the judge's findings under Article 8. The judge set out the Article 8 matter. He refers to the long residence

provisions within the Immigration Rules, notes he had been asked to consider the case under Article 8, did not find that there were any exception or compelling circumstances to justify consideration outside the Rules and found that the appellant was not able to succeed within the new Rules reflecting Article 8.

25. There may be arguable merit in the fact that as this is an EEA decision the new Rules are not applicable but there is a more fundamental issues in relation to this matter. The decision under challenge is a refusal to recognise a particular status claimed under the EEA Regulations. It is not a decision to remove. It is not a decision that will result in any disruption to or interference with a right to family or private life within the United Kingdom such as to engage Article 8 at all. It is known, and Mr Tufan has assisted the Tribunal in relation to this matter, that the application of Article 8 in an EEA appeal has been examined by the Upper Tribunal and a determination is forthcoming dealing with this point but that was not available on 8 October 2014 and so I make no further reference to it.

Notice of Decision

26. I do not find it has been established on the facts of this matter that a material legal error has been made and on that basis I dismiss the appeal.

No anonymity direction is made.

Signed Date: 20 August 2015

Upper Tribunal Judge Hanson

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 20 August 2015

Upper Tribunal Judge Hanson