Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03945/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On 22nd May 2017	**On 20th September 2015**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

Aigulu Baigaziva
(no anonymity direction made)

Respondent

For the Appellant:	**Mr McGirr, Senior Home Office Presenting Officer**
For the Respondent:	**Ms Patyna, Counsel instructed by Sterling & Law Associates Ltd**

DECISION AND REASONS

1. The Respondent is a national of Kyrgyzstan born on the 2nd November 1982. On the 24th November 2016 the First-tier Tribunal (Judge S. Meah) allowed her appeal under the Immigration (European Economic Area) Regulations 2006 ('the Regs'), finding that she had retained a right of residence as the former

spouse of an EEA national. The Secretary of State for the Home Department now has permission to appeal against that decision.

2. The agreed facts are that Ms Baigaziva arrived in the UK in June 2009 with valid leave to enter as a Tier 4 (General) Student Migrant. In October 2011 she was granted a residence card on the basis of her marriage to Ceslavas Levanovicous, a Lithuanian residing in the UK. The marriage ended, that is to say a decree absolute was granted, on the 6th May 2015. On the 12th June 2015, she made an application for a residence permit as a family member with retained rights of residence.

3. In response to Ms Baigaziva's application the Secretary of State for the Home Department issued a decision letter dated 9th December 2015. The application was rejected for only one reason. Ms Baigaziva had failed to demonstrate that her ex-husband had been exercising treaty rights at the date that her marriage terminated, the 6th May 2015. Three payslips from 2014 had been submitted but this was not sufficient information for the Secretary of State for the Home Department to be satisfied that he had continued to work up until the time of divorce. Ms Baigaziva requested that the matter be reviewed, and asked that the Secretary of State for the Home Department conduct inter-departmental checks on her ex-husband's work record. This the Secretary of State did. A supplementary refusal letter was issued on the 5th May 2016. The Secretary of State had checked HMRC records and was satisfied that Mr Levanovicous had been working from the 8th September 2014 to the 4th December 2014. There was no evidence that he had been working in May 2015 and so the decision to refuse was maintained.

4. The First-tier Tribunal was asked to determine the matter on the papers before it. Ms Baigaziva submitted what evidence she had, and a skeleton argument. Therein her representatives placed express reliance on Article 13(2) of the Directive 2004/38/EC[1] ('the Directive'), and on the decision in Singh and Others v Minister for Justice and Equality C-218/14. It was argued that the Secretary of State for the Home Department had been wrong to focus on the date of divorce: the relevant date was in fact the 4th December 2014, the date that Ms Baigaziva had *instituted* divorce proceedings. Since the HMRC records showed that her ex-husband had been working in the UK on that date, it followed that her application should have been granted.

[1] DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/E68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

5. This line of argument was adopted by the First-tier Tribunal. The determination holds, "in the light of Singh and Others", that the interpretation made by Ms Baigaziva's representatives was correct. The relevant date for the purpose of calculating whether she had retained her rights of residence was the 4th December 2014, the day that she filed for divorce. The appeal was thereby allowed.

The Secretary of State's Appeal

6. The single ground of appeal is that the decision of the First-tier Tribunal is flawed for legal misdirection. The Secretary of State for the Home Department contends that the relevant date is the *date of dissolution of marriage* not the date upon which divorce proceedings are instituted. The Secretary of State submits that the First-tier Tribunal has misunderstood the *ratio decidendi* of Singh and Others.

7. Before me Mr McGirr submitted that the operative domestic law is Regulation 10(5) of the 2006 Regs. Sub-paragraph (a) thereof contains three limbs. The applicant must have been a 'family member', her spouse must have been a 'qualified person' and those two conditions must have been in existence upon the termination of marriage:

> **10.**—(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> …..
>
> **(5) A person satisfies the conditions in this paragraph if—**
>
> **(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;**
>
> **(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;**
>
> **(c) he satisfies the condition in paragraph (6); and**
>
> **(d) either—**
>
> **(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least**

> **three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;**
>
> **…..**

8. An unambiguous requirement, as far as the Regulations are concerned, was therefore whether Mr Levanovicius had been a 'qualified person' at the date that the marriage was terminated.

9. As for Singh, Mr McGirr argued that this decision simply could not be read in the manner suggested by the First-tier Tribunal. That case concerned a different factual matrix, and a different legal question. The matter before the CJEU had been whether a non-EEA spouse could retain a right of residence in circumstances where their EEA spouse had left the member state where they had both lived, and then filed for divorce. The findings of the court, that rights were not retained in those circumstances, did not assist Ms Baigaziva.

The Response

10. Ms Patyna submitted that the First-tier Tribunal had not erred. It had directly applied the terms of the Directive:

> **Article 13**
>
> **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership:**
>
> 1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
>
> **2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:**
>
> **(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or**
>
> …

11. This had been the Article under consideration in Singh. The matter in issue before the court in that case had been whether a non-EEA spouse could retain a

right of residence where his divorce was preceded by his EEA wife leaving the member state in question. The court held not, on the basis that the EEA spouse having already left, there were no Article 7(1) rights for the non-EEA spouse to retain, but in reaching that conclusion said the following:

> 59 In accordance with Article 13(2)(a) of Directive 2004/38, divorce does not entail the loss of the right of residence of a Union citizen's family members who are not nationals of a Member State 'where … prior to initiation of the divorce … proceedings … the marriage … has lasted at least three years, including one year in the host Member State'.
>
> 60 That provision thus corresponds to the purpose, stated in recital 15 in the preamble to the directive, of providing legal safeguards for family members in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership, taking measures in that respect to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.
>
> 61 The reference in that provision to, first, 'the host Member State', which is defined in Article 2(3) of Directive 2004/38 only by reference to the exercise of the Union citizen's right of free movement and residence, and, secondly, 'initiation of the divorce … proceedings' necessarily implies that the right of residence of the Union citizen's spouse who is a third-country national can be retained on the basis of Article 13(2)(a) of Directive 2004/38 only if the Member State in which that national resides is the 'host Member State' within the meaning of Article 2(3) of Directive 2004/38 on the date of commencement of the divorce proceedings.
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> 62 That is not the case, however, if, before the commencement of those proceedings, the Union citizen leaves the Member State in which his spouse resides for the purpose of settling in another Member State or a third country. In that event the third-country national's derived right of residence based on Article 7(2) of Directive 2004/38 has come to an end with the departure of the Union citizen and can therefore no longer be retained on the basis of Article 13(2)(a) of that directive.
>
> **63 It follows that, if on the date of commencement of the divorce proceedings the third-country national who is the spouse of a Union citizen enjoyed a right of residence on the basis of Article 7(2) of Directive 2004/38, that right is retained, on the basis of Article 13(2)(a) of that directive, both during the divorce proceedings and after the decree of divorce, provided that the conditions laid down in the second subparagraph of Article 13(2) of the directive are satisfied**.

(emphasis added)

12. Ms Patyna relies on the passage highlighted. She submits that nowhere in the judgement does the court suggest that final divorce would be the operative point at which rights would be retained. It proceeded at all times on the basis that the operative date was the initiation of proceedings, and this is consistent with the wording of the Directive itself. Ms Patyna further relied on the decision in the Secretary of State for the Home Department v NA C115/15 in

which the CJEU adopts the reasoning in Singh insofar as it uncritically refers to the 'institution of proceedings' rather than formal dissolution of marriage.

Discussion and Findings

13. There is much to commend the argument put by Ms Patyna. In addition to the *dicta* in Singh, the overall purpose of Article 13 must be considered. Recital 15 of the Preamble to the Directive reads:

> (15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. **With due regard for family life and human dignity, and in certain conditions to guard against abuse**, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(emphasis added)

14. These aims are reflected in Articles 12-14 of the Directive. Article 12 provides for the retained rights of residence for family members where the EEA national dies; Article 13 is concerned with their situation where the marriage comes to an end. The Directive does not provide these legal safeguards for all family members. By Article 13 (2) the class of family members who may benefit from the provisions is limited to situations where there is a child involved, where the marriage has subsisted for a prescribed minimum period, or where there are "particularly difficult circumstances". The ratio of limiting the classes of potential beneficiaries is readily understandable from Recital 15: the point, as ever, is not to inhibit free movement and to preserve human dignity, but with certain safeguards in place to prevent abuse.

15. Ms Patyna placed considerable emphasis on the positive aims of the provision. She points out that Union citizens could easily foil the attempts of their estranged partners to safeguard their positions by unilaterally ceasing to exercise treaty rights or by leaving the host country before the divorces were declared absolute. This could give rise to the potential for abuse and in those circumstances it must be preferable to focus on the date upon which proceedings were instituted rather than finalised.

16. The 'purposive' argument found some favour in the High Court of the Republic of Ireland in the case of Khalid Lahyani v Minister for Justice and Equality [2013] IEHC 176. There the court was asked to consider whether the non-EEA citizen retained rights of residence when he had neither a divorce nor an EEA spouse exercising treaty rights, his wife having left the country. Although on the facts the case was rejected, the Court held that the aims of the Directive

were clear, and that the preservation of human dignity required an expansive interpretation:

> 56. The applicant does not claim to fall within the category of vulnerable spouses who are deserving of protection under Article 13(2) (c) but he points to that sub-paragraph as an indicator of the flexible approach to be taken to the interpretation of Article 13(2) as a whole. The applicant's primary argument was that **Article 13(2) must be interpreted in a manner which permits a non-EU spouse to remain in the host State while either party to the marriage petitions for divorce, even after the departure of the Union citizen spouse, and that any interpretation which fails to allow for this would render the legal protections to the family members of a migrant Union citizen a nonsense.** For the reasons to be outlined hereafter, the Court considers that the caselaw of the CJEU and especially the cases of *Diatta* and *Metock* (cited above) provide strong support for this proposition. While Article 13 does not expressly mention such a possibility, Article 13(2) (c) itself envisages the need for discretionary application of the retention of the right of residence in "*particularly difficult circumstances*". It follows that the Court is not convinced that the divorce, annulment or termination which triggers the vesting of autonomous rights in the non-EU spouse under Article 13(2) must take place solely during the period of joint lawful residence in the host state.
>
> 57. It is not difficult to envisage circumstances where an interpretation which confines retained rights of residence exclusively to spouses who have obtained divorces while the Union citizen is exercising treaty rights in the host state might be unduly restrictive in light of the need to interpret the provisions of the Article 13 "*with due regard for family life and human dignity and in certain conditions to guard against abuse*" (recital 15). An example of how a strict interpretation of Article 13 might breach the object of the Directive and render it ineffective could be found where the non-EU spouse is deserted in the host state without any warning that the marriage was in difficulty and before the possibility of divorce arose. The object of the Directive is to facilitate the free movement of Union citizens and their family members and Articles 12 and 13 are clearly designed to provide for compassionate consequences when negative but predictable life events such as matrimonial breakdown, death and divorce occur. **As the wording of Article 13 clearly demonstrates that a spouse, no matter what the nationality, retains a right to reside in the host state in the event of divorce, it would be unfair to exclude from Article 13 those non-EU spouses who through no fault of their own have not had the opportunity to obtain a divorce or even to obtain a final decree where, for instance, divorce proceedings were initiated but the Union spouse left before the process was complete so as to frustrate or upset the plans of the non-EU national**.
>
> 58. There must be multiple variations of family breakdown where the Union citizen might depart the host state leaving the non-Union spouse behind. It would render the protections afforded by Article 13 ineffective if host states were to expel a deserted non-EU spouse before the expiry of a reasonable period during which the non-EU spouse could seek dissolution of the marriage with a view to claiming a personal right of residence under Article 13(2), subject to the Article 7 conditions which are applicable to divorced non-EU spouses. To revoke the lawful status of such non-EU spouses without affording an opportunity to seek a divorce would do a disservice to Article 13. If, to give another example, the non-EU spouse had already commenced divorce proceedings which were being pursued at the time of departure of the Union citizen and the interpretation urged by the Minister were applied, the non-EU spouse would face the choice of uprooting from the host

country in which he was installed and, pending finalisation of the divorce, becoming the unwelcome guest of the estranged EU spouse in whatever EU State she went to, or of returning to his own country. That choice would seem contrary to the spirit and object of Article 13 and again, it seems to the Court it would be an unnecessarily restrictive interpretation of that Article.

59. **Another consideration which leads the Court to this view is that divorce may not always be an available option to the parties to a marriage which has irretrievably broken down as procedural requirements differ enormously from state to state within the EU. Divorce proceedings in Ireland are governed by constitutional provisions and are restrictive. There is an absolute requirement that the parties must have been separated for a minimum of 4 years out of the previous five years before matrimonial proceedings for a decree of divorce can be commenced. Even judicial separation requires a minimum period of 12 months separation before the institution of proceedings and even so, a judicial separation may not be sufficient to trigger rights under Article 13. In other member states where agreement is reached on a division of property and there are no children, a consent divorce can be obtained in a matter of months. That is not an option in this State. If Directive 2004/38/EC is intended to apply uniformly across the Member States without discrimination, then a spouse of a migrant Union citizen should not be prejudiced in his / her right to benefit from Article 13 by the choice of host state made by the Union citizen and the domestic law relating to dissolution of marriage in that state.**

60. **It is therefore the view of this Court that Article 13 must be interpreted expansively to provide for the occasions where marriages and civil partnerships do not work out and where the Union worker simply deserts and quits the host state before matrimonial proceedings are contemplated**. Each case must be determined by its own facts and a measure of discretion applied to allow for the almost infinite variations in the way that genuine relationships and marriages disintegrate. Having expressed that view, the Court is equally convinced that it cannot be the general rule as postulated by the husband that departure of the Union citizen worker confers either an indefinite or permanent right of residence while the deserted non-EU spouse considers his / her options and whether or not divorce is being contemplated. The wide interpretation of Article 13 – with due regard for human dignity and to prevent abuse – must be restricted to genuine marriages and genuine irretrievable breakdown of relationships. As the Court has already noted, if the relationship has not broken down irretrievably, the non-EU spouse is expected to leave the host state and travel with the Union citizen.

17. The Court found no contradiction in the notion that an individual could still in law be a family member (ie legally married) whilst at the same time retaining rights as a former family member:

65. For the sake of completion, **the Court is satisfied that no difficulties arise with the interpretation of Article 13(2) where, although separated and seeking a divorce, both spouses continue to reside in the host state and where the Union citizen is continuing to work or is self-sufficient. In accordance with the principle set down in *Diatta* (cited above), the non-EU spouse retains a derivative right of residence at all times up to the finalisation of the couple's divorce, provided that the Union spouse is resident in the host state and exercising free movement rights. Once the divorce is finalised, working or self-sufficient non-EU spouses gain a personal right of residence under Article 13(2),** irrespective of whether the Union citizen continues to reside and exercise free

> movement rights in the host state, in the same way that death and departure provisions apply to family members of the EU worker previously living and working in the host state. Article 13 is a new departure in free movement rights which, when read with recital 15 to the Directive, is clearly intended to protect non-EU spouses from being obliged to leave the host state because their legal status in the host state has been altered by the dissolution of their marriages. The Article is clear – divorce obtained while the Union citizen is exercising free movement rights in the host state does not adversely affect the right of the non-EU spouse to reside in the host state, provided that the marriage has lasted for at least three years with at least one of those years in the host state before the divorce proceedings were commenced and provided that the non-EU spouse is not a burden on the state. **In the period between commencing such proceedings and the final decree, the parties are still legally married even if living apart (see *Diatta*) and the non-EU spouse retains his / her derivative right of residence until the divorce is finalised, at which point he or she gains a right of residence under Article 13 on an exclusively personal basis…**

(emphasis added)

18. This is certainly an attractive argument. It seems manifestly unfair that the non-EEA spouse who files for divorce in acrimonious circumstances could be at the mercy of his or her EEA spouse, who could simply give up work before the divorce is finalised. I am nevertheless satisfied that it is the approach advocated by the Secretary of State in this appeal which is the correct one.

19. First, there is the language of Article 13 of the Directive itself:

> 2. Without prejudice to the second subparagraph, **divorce, annulment of marriage or termination of the registered partnership** referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
>
> (a) **prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or**
>
> (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
>
> (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
>
> (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

(emphasis added)

20. The opening sentence of Article 13 (2)(a) (highlighted) contains the test that is transposed into Regulation 10 (5)(a): "he ceased to be a family member of a qualified person on the **termination of the marriage** or civil partnership of the qualified person". The alternative sub-clauses in Article 13(2)(a)-(d) do not import an alternative test; rather they are all concerned with defining the class of persons who is permitted to benefit from retained rights of residence.

21. Second, it is arguable that there must logically come a point when rights of residence that were once 'derived' become 'retained'. From the date that she married in October 2011 until the date that she was finally divorced in December 2014 Ms Baigaziva was a *family member* of an EEA national: Diatta v Land Berlin C-267/83. As long has he remained in the same host country as she, in accordance with the Directive, she would continue to be treated as such. It is difficult to understand why she would need the legal safeguard of Article 13(2)(a), if she still enjoyed the benefits of Article 7(1).

22. Interpreting the Article in this way would provide for legal certainty. The institution of proceedings is not a sufficiently clear basis upon which to confer a permanent right of residence: what for instance if the couple are reconciled? The non-EEA spouse who has secured a declaration of retained rights would at that point be in a more advantageous position than if his or her marriage had persisted uninterrupted. The EEA spouse could give up work, or even leave the country, and notwithstanding that the couple were still married, the partner would be unaffected.

23. In conclusion I find that Article 13(2)(a) is concerned with defining the kind of marriage which would attract protection, and nothing else. In respect of the stated purpose of the 'retained rights' provisions it is of course the case that the truly vindictive spouse could subvert his or her spouse's chance of remaining in the host country at any time: see Singh and Ors v Minister for Justice and Equality C-218/14 where the EEA spouses concerned all left the Republic of Ireland before the divorces were even filed.

24. It follows that the Secretary of State must succeed in her appeal. The burden of proof lay on Ms Baigaziva, who was unable to show, even with the assistance of an *Amos* direction, that her former husband was a qualified person at the date that their marriage ended.

Decisions

25. The determination of the First-tier Tribunal contains a material error of law and it is set aside.

26. I re-make the decision in the appeal as follows: "the appeal is dismissed".

27. There is no order for anonymity.

Upper Tribunal Judge Bruce
15th August 2017