Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04053/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2018	**On 19 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MRS BOLATITO BIMPE OLALEKAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, Counsel instructed by Universe Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 13 May 1980. She claims that she arrived in the United Kingdom, clandestinely, in 2005. On 4 August 2010 she was granted an EEA residence card (pursuant to the Immigration (European

Economic Area) Regulations 2006, "the 2006 Regulations") as the family member of Mr Luis Miguel Rebelo Dos Santos, a Portuguese national, whom she had married on 12 December 2009. The residence card was valid until 4 August 2015. On 31 July 2015 the appellant applied for permanent residence as a family member who has retained the right of residence after the termination of her marriage, the couple having commenced divorce proceedings on 11 May 2015. A decree absolute was issued on 5 October 2015. That application was initially refused on 29 November 2015. Following receipt of additional evidence the Secretary of State agreed to reconsider the application. The application was refused once again on 17 December 2015. The Secretary of State accepted that the appellant was married to the sponsor and that the marriage had lasted for three years and that the couple had spent at least one year together in the United Kingdom. However, the respondent did not accept that the appellant had provided evidence that the sponsor, her ex-husband, was a qualified person at the point of divorce.

The appeal to the First-tier Tribunal

2. The appellant appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 27 April 2017 First-tier Tribunal Judge Courtney dismissed the appellant's appeal. The judge was not satisfied that the appellant's former husband was a qualified person at the time of the divorce and therefore she is not a family member who has retained the right of residence. The judge also went on to consider permanent right of residence and found that there was insufficient evidence that the appellant's ex-husband had been exercising treaty rights and was therefore a qualified person during the relevant period because there were significant gaps in his work history.

3. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 8 November 2017 First-tier Tribunal Judge Pickup refused permission to appeal. The appellant renewed her application for permission to appeal to the Upper Tribunal and on 8 January 2018 Upper Tribunal Judge Kamara granted the appellant permission to appeal.

The hearing before the Upper Tribunal

4. The appellant submits that the judge erred in law by failing to conclude that the appellant had established, by way of the extensive payslips, the EEA national's evidence of employment in October 2015. There was an absence of reasoning for not concluding that the EEA national was qualified in view of the cogent evidence submitted in respect of the relevant period. The judge was not entitled to reach the conclusion she did by noting that other evidence could be obtained. She was obliged to reach a decision on the evidence adduced. The judge did not acknowledge the three months' payslips covering the period August to December was good evidence She provided no reason for its rejection and proceeded to note the absence of other evidence. There is no proscribed form of evidence to establish that the EEA national was a qualified person. Without more, the conclusion of the judge at paragraph 20 cannot stand. It is not transparent why the apparently cogent evidence of the

employment was rejected by the judge. The period August to December 2015 is a few months within a long history of employment. It submitted that it is artificial and unreasonable to focus on the short period around 5 October 2015 and find the payslips inadequate in view of the very long history of employment by the EEA national.

5. The judge errs at paragraph 24 when he concludes in the alternative that the appellant has not established that the EEA national has resided in the UK exercising treaty rights for any continuous period of five years from the date of marriage which was December 2009. While the judge noted the evidence that was there, including HMRC evidence of continuous national insurance contributions of more than five continuous years, she considered the evidence for one period as being evidence of purely marginal and ancillary employment. It is submitted that the conclusion is perverse when the evidence is looked at as a whole.

6. At the hearing Ms Iqbal submitted that the appellant has demonstrated that at the date of the divorce the EEA national was a qualified person. She submitted that the judge has applied too stringent a test and imposed a higher threshold than required in terms of evidence.

7. Ms Everett submitted that the findings were open to the judge. The burden is on the appellant to discharge the burden of proof. She accepted that there had been no challenge to the validity of the payslips, however, those payslips ought to be considered in light of the evidence overall. If there were significant gaps in the evidence the judge was entitled to take that into consideration when deciding what weight to attach to three isolated payslips. She submitted that the judge had given sufficient reasons for the conclusions reached when the determination was looked at as a whole. She accepted that the challenge on the basis that the judge applied too high a standard with regard to the evidence required is a good one and not an erroneous challenge. However, the judge would have to satisfy himself that the appellant was married to a qualified person and at the time of the divorce he was exercising treaty rights - in this case through employment.

8. Ms Iqbal argued that there was a considerable amount of cogent evidence in the case. She referred to various documents that were in the appellant's bundle which clearly demonstrated that her ex-husband had been exercising treaty rights for a period in excess of five years and therefore the appellant met the permanent residence test. She referred in particular to a number of documents in the bundle which demonstrated that the appellant's ex-husband had been exercising treaty rights over a prolonged period, for example a letter from HMRC at page 122 of the bundle which confirms that the appellant had fifteen qualifying years of national insurance contributions up to 5 April 2015. At page 120 of the bundle there was another letter from HMRC showing between 2006 and 2012 national insurance credits and at page 127 which set out a schedule from 2001 to 2014 of national insurance contributions being paid.

9. The judge considered two matters as argued in the skeleton argument. Although the appellant had applied for a residence card as a person with a right to permanent residence the appeal was argued on the basis that the application for a residence card was formulated as a residence card on the back of a retained right of residence. The judge, therefore, dealt firstly with the retained right of residence and then the permanent residence issue. It was accepted by the respondent that the appellant met the requirements that there was a genuine marriage that had lasted more than three years and that the couple had spent more than one year together in the UK. The judge considered all the evidence carefully in this case. She set out:

> "17. It is a general principle of Community law relating to the exercise of free movement rights that, except where it is specified that only certain means of evidence are admissible, evidence may be adduced by any appropriate means ...Member States have a degree of discretion in asking for evidence that the conditions are met. There are no specific evidential requirements in the Regulations, but the Home Office has issued Guidance. ...This provides that evidence of paid employment may include:
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> - payslips dated no more than 6 weeks before the application was made;
> - a letter from the employer confirming employment;
> - a contract of employment.
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> 18. The Appellant states that as at the date of the divorce Mr Santos was working for Staffline Group Plc. The appeal bundle includes copy payslips covering the 12-week period 21 August–13 November 2015. These show that Mr Santos worked a 16-hour week @ £9.24 per hour, increasing to a 40-hour week as from 28 August. The most recent payslip indicates taxable pay to date of £11,963.40. Ms Pinder submitted that the payslips had been served on the Respondent in November 2016 as part of the Appellant's bundle, allowing ample time for checks to be undertaken. No issue had been taken by the Secretary of State with regard to the validity of Mr Santos' payslips.
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> 19. There is no letter from the employer confirming employment, and no contract of employment. There are no bank statements showing earnings from Staffline going into Mr Santos' account, and no HMRC documents. The Appellant's representatives did not seek an 'Amos direction' requiring the Secretary of State to supply any information necessary for the determination of their client's appeal.
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> 20. I recognise that the Regulations themselves do not specify evidence, and the guidance is at most an aid to constriction of the Regulations. However, the burden of proof is on the Appellant to produce relevant evidence to substantiate her claim. I am not satisfied, on the balance of probabilities, that Mrs Olalekan's former husband was a 'qualified person' at the time of the divorce. She is not a family member who has retained the right of residence.

10. Dealing firstly with the right to retained residence, the judge accepted the payslips showed that the sponsor worked for Staffline Group Plc during the period 21 August

– 13 November 2015 and appears to have accepted the submission that no issue had been taken by the respondent with regard to the validity of the payslips (they were served on the respondent in November 2016, after the reasons for reasons for refusal letter was issued). There is no requirement for any specified evidence (as recognised by the judge.). In the absence of any suggestion that the judge considered that these documents were not valid it is not clear why the judge was not satisfied that the evidence was sufficient to demonstrate that the sponsor was employed at the date of divorce. The judge appears to have imposed additional requirements for evidence without giving any reasons for rejecting the evidence that was provided. This was a material error of law.

11. The judge then considered the permanent right of residence issue setting out:

> 21. Even if I am wrong in this conclusion, I do not consider that the Appellant has established that she has acquired the right to reside in the United Kingdom permanently under regulation 15.
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> 22. Regulation 15(1)(f) contains a twofold test. An applicant must first show that she has resided in the UK in accordance with these Regulations for a continuous period of five years (Regulation 15(1)(f)(i)), and then that she is someone who was, at the end of that period, a family member who has retained the right of residence. ...For the purposes of Regulation 15(1)(f) one must, in my judgment, have regard to a continuous period of five years in the time between the marriage (12 December 2009) and the date of the hearing (24 March 2017). Prior to the termination of the marriage on 5 October 2015 the Appellant's residence was dependent upon Mr Santos' status as a qualified person. Thereafter Mrs Olalekan has a retained right of residence under Regulation 10(5), assuming she can show that she herself has been a worker, a self-employed person or a self-sufficient person during this period.
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> 23. The EEA(PR): guidance notes ...'detailed guidance on the evidence you must submit if you are applying for a document certifying permanent residence or permanent residence card'. With regard to employment the guidance provides as follows:
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> - Letter from each employer confirming the dates you/your sponsor worked for them, salary/wages, normal hours of work, and the reason the employment ended (if relevant);
> - Wage slips and/or bank statements showing receipt of wages...;
> - P60s for each year in which you were/your sponsor was employed.
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> If you can't submit the document above (for example, you've lost the relevant documents, the employer is no longer trading or you are/your sponsor is unable to contact them), you should enclose a letter explaining why not. ...You must submit alternative evidence of the relevant employment, such as:
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> - P45s;
> - signed contract of employment;

- notice of redundancy;
- letter accepting resignation;
- letter of dismissal;
- employment tribunal judgment relating to the employment.

24. As previously noted, prior to the termination of the marriage on 5 October 2015 the Appellant's residence was dependent upon Mr Santos' status as a 'qualified person'. However, there are significant gaps in his work history. In particular, the only piece of evidence which touches upon his employment in the 2014/15 tax year is an HMRC letter dated 22 October 2015 stating that Mr Santos had accrued 15 qualifying years NICs up to 5 April 2015. With regard to the 2013/14 tax year there is evidence of paid employment with First Recruitment Services Ltd, but his P45 shows total earnings of only £381.30. The HMRC letter shows an NI contribution due in 2013/14 of just £0.42. This indicates activities on such a small scale as to be regarded as purely marginal and ancillary.

...

29. I find that Mrs Olalekan does not meet the requirements of Regulation 15(1)(f) because there is insufficient evidence to show that she has been residing in the UK in accordance with the Regulations for a continuous 5-year period."

12. Although the appellant relied considerably on the letter from HMRC that demonstrates that the appellant's ex-husband had accrued fifteen years of qualifying national insurance contributions the last period recorded was 2013/14 and as that year showed minimal contributions of 42p it does not demonstrate a continuous period of five years during the relevant period. The judge considered carefully all the documentation and was entitled to note that in the period 2013-2014 the appellant's earnings were very minimal amounting to £381.30. The minimum level of earnings is reflected in the HMRC letter, indicating the national insurance contribution for that year was £0.42. That year falls within the five year continuous qualifying period and is indicative that the appellant's ex-husband was unlikely to be exercising treaty rights in the UK continuously during that period. It is for the appellant to demonstrate that he was exercising treaty rights, not for the Tribunal Judge to reach a finding that he was not. There was no error of law in respect of the judge's findings on permanent right of residence.

Re-making the retained right of residence issue

13. As set out above the appellant provided payslips covering a 12-week period 21 August–13 November 2015. These demonstrate that the sponsor worked a 16-hour week, increasing to a 40-hour week as from 28 August. The most recent payslip indicates taxable pay to that date of £11,963.40. The respondent did take any issue regarding the validity of the payslips either prior the First-tier Tribunal hearing or in response to the grounds of appeal or at the hearing of the appeal before me. The respondent accepted that the appellant met the other requirements of Regulation 10

of the 2006 Regulations, i.e. that there was a genuine marriage that had lasted more than three years and that the couple had spent more than one year together in the UK. The judge accepted that the appellant was working in the UK. I am satisfied that the appellant meets the requirements of Regulation 10 - she is a family member who has a retained the right of residence. The appellant's appeal is allowed to this limited extent.

14. I ought to mention that an application was made for a direction under Rule 4(3)(d) of the Tribunal Procedure Rules that the Tribunal exercise its power to permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal. The appellant refers to the case of **Amos v SSHD [2011] EWCA Civ 552**. I did not need to consider that application as I did not find an error of law in the First-tier Tribunal's decision on the permanent right of residence issue.

Notice of Decision

The appeal against the First-tier Tribunal's decision is allowed on a limited basis.
The appellant's appeal against the Secretary of State's decision on the retained right of residence issue is allowed.
The appeal against the First-tier Tribunal's findings on the permanent right of residence issue is dismissed. The Secretary of State's decision on this issue therefore stands.

No anonymity direction is made.

Signed P M Ramshaw Date 18 March 2018

Deputy Upper Tribunal Judge Ramshaw