



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34957/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 30th November 2017

Decision Promulgated
On: 3rd January 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

GLADYS CHINENYE SAMUEL
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Al-Rashid, Counsel instructed by direct access
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria date of birth 19th November 1986. On the 28th November 2016 the First-tier Tribunal (Judge Brookfield) dismissed her appeal against the Respondent's decision to refuse to grant her confirmation of a permanent right of residence under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006. The Appellant was granted permission to appeal against the First-tier Tribunal's decision on the 28th April 2017. Following a hearing on the 14th June 2017 the decision of Judge Brookfield was set aside by consent.

2. The matter in issue in this appeal is whether the Appellant has retained a right of residence as the family member of an EEA national following the dissolution of her marriage to Hungarian national Csaba Androvics. It is not in dispute that the couple had married in 2008 and that on the 12th January 2011 the Respondent had issued the Appellant with a five year residence permit on the basis of the marriage. The marriage broke down and the divorce was finalised on the 22nd January 2015. The Respondent refused to recognise any retained rights because she was not satisfied that the Appellant's former husband had been exercising treaty rights at the date that the marriage was dissolved.
3. The difficulty that the Appellant has found herself in is that her ex-husband has refused to cooperate and provide details of his economic activity at the date of divorce. Judge Brookfield had dismissed the appeal in the absence of such evidence, adopting the comments of Lord Justice Stanley Burnton in Amos v Secretary of State for the Home Department [2011] EWCA Civ 552 to the effect that the proceedings are essentially adversarial in nature and that it is not for the Home Office to make applicants' cases for them, for instance by spontaneously checking the HMRC records of ex-husbands. What the Tribunal had not appreciated was that the Appellant had in fact sought, and had been granted, an *Amos* direction. Principle Resident Judge Martin had directed, as long ago as the 30th September 2016 that the Respondent conduct that very enquiry. This direction had been overlooked by the Respondent so that when the matter came before Judge Brookfield, it had not been complied with. It was on this basis that the decision of the First-tier Tribunal was found to be flawed for procedural unfairness and the matter set aside.
4. When the matter came back before me on the 13th September 2017 there had been some progress. The Respondent had been in touch with HMRC, and by way of a witness statement of an Officer of HMRC named Roger Drew, had produced evidence to show that there were no self assessment tax records for Mr Androvics, with national insurance number SK*****, in the years 2013-2014 or 2014-2015. Nor were there any PAYE records. He was registered as a self-employed gardener from 4th January 2016, but that did not assist the Appellant, since the operative date as far as her appeal was concerned was the 22nd January 2015.
5. Against this evidence, the Appellant relied on the following:
 - i) A letter dated 27th September 2016 from Jonathan Abraham, the director of 'Josam Services', a company based in London. The Appellant explained that this was the company that her ex-husband worked for when they were together. She believes that it was an 'odd-job' service and that her husband did jobs like painting and gardening. She approached Mr Abrahams after the divorce and he agreed to provide her with this letter. It states that he employed Csaba Androvics from April 2012 to January 2015 and that his closing salary was £420 per month.

- ii) Two payslips issued to Mr Androvics from 'Josam Services' in January and February 2015. The Appellant states that her husband worked until the end of January and that the February payslip reflects that. The payslips both indicate that PAYE tax, and national insurance contributions were deducted from Mr Androvic's salary.
 - iii) A letter dated 3rd September 2016 from Coker Isah & Co, a company who identify themselves as Chartered Certified Accountants instructed by Mr J. Abrahams, who trades as Josam Services. Because he is a sole trader the company is not registered with Companies House but he is registered for tax, and as an employer with HMRC. Coker Isah provide his PAYE reference number. Appended to the letter is a P60 for Mr Androvics for the year dated 2013-2014. It shows his employer to be Josam Services and his earnings to have been £6300. His NI number is recorded as SK*****.
 - iv) A further letter from Coker Isah dated 18th August 2018. It is addressed to HMRC and was apparently written after the Appellant brought the statement of Mr Drew to their attention. Coker Isah assert that Mr Abrahams did make some PAYE payments in respect of his employee Mr Androvics, and request confirmation of the same. Significantly Mr Androvics details are recorded as follows: 'NINO SK***** or Error one JP*****'. Attached is a statement of Mr Abraham's PAYE liabilities which show that he was at least paying PAYE, for someone, between November 2015 and January 2016.
 - v) Coker Isah have further produced another P60 for Mr Androvics, with the NI number JP***** , showing him to have been working for Mr Abrahams in the year 2012-2013.
6. The conflict in the evidence was difficult to resolve. On the one hand, the HMRC were saying that there are no records for any tax being paid for Mr Androvics in any capacity in the years 2013-2014 and 2014-2015, and on the other hand Mr Abrahams had written to confirm that he had in fact employed him in that period; a firm of Chartered Certified Accountants assert the same, and that they believe the PAYE tax to have been paid. A P60 has been produced at least in respect of the year 2013-2014. Mr Rashid made the good point that neither Mr Abrahams or Coker Isah have any obligation towards the Appellant, they have supplied the information that they have in good faith knowing that it is to be brought before a court. At the hearing before me in September the parties agreed that one possible explanation for the conflicting records could be the apparent use of two national insurance numbers for Mr Androvics. The parties agreed that investigation of that anomaly might resolve matters one way

of the other and that it would be in the interests of justice to adjourn the final determination of the appeal until further information could be obtained from the HMRC. The matter was therefore adjourned.

7. On the 30th November 2017 the hearing was resumed. Each side had produced yet further conflicting evidence.
8. Mr Harrison for the Respondent relied upon a further statement from an HMRC officer, a Mr Matthew Anthony Jenkins, who had, upon request from the Respondent, conducted a check on the national insurance number JP*****. He was unable to trace any records relating to that national insurance number.
9. For her part the Appellant had produced a further witness statement, and an exhibit. The statement is dated the 24th November 2017. The Appellant explained that she had been unable to obtain any further information from Josam Services, or from their accountants. She had therefore tried to contact friends of her ex-husband from when they were married. She managed to speak to a man named Andreas who agreed to help her. After a few days he called her to say that he had spoken with her former husband who had agreed to call the HMRC for her. A few days later she received to her address a letter from the HMRC, addressed to her ex-husband. She spoke with Andreas who assured her that her ex-husband authorised her to open the letter.
10. The letter is dated the 2nd November 2017. It states that in the tax year 2014 to 2015 Mr Androvics was registered as self-employed. It gives no detail as to whether he might have declared any income, but a separate box does indicate that apart from one day of claiming ESA in October 2015 he had zero income declared.
11. Mr Rashid submitted that notwithstanding the HMRC records, the evidence established that Mr Androvics was economically active in January 2015, and meets the requirements of Regulation 4(1)(b). I have payslips, evidence from his former employer and evidence from the employer's accountants to that effect. He further submits that I should take into account the fact that the Respondent had previously recognised that Mr Androvics was a qualified person; it is not in issue that the Appellant was previously granted a family permit as his spouse. In this regard he relied on the decision in Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC) in which Blake J indicated that in the absence of evidence about a given date decision-makers should look to evidence about surrounding dates, taking into account, for instance, if there is evidence of economic activity prior to, and after the date of divorce.
12. Mr Harrison accepted that the evidence was ambiguous. Whilst there was evidence to indicate that Mr Androvics was doing *something* in January 2015 it was not clear what. The HMRC records said he was self-employed, and yet he

had paid no tax. His employment records showed tax had been deducted at source, 'PAYE', but again this was not reflected in the tax records.

Discussion and Findings

13. There is a clear and striking discrepancy between the records held by HMRC, and those held by everyone else in this case. The HMRC have Mr Androvics registered as self-employed on the day that he and his wife divorced, with no income declared. Josam Services, their accountants Coker Isah and Mr Androvics himself appear to have believed him to be an employee, and that PAYE tax was paid on his behalf. The possible confusion that might have been caused by his having two NI numbers remains unresolved. The fact that no tax appears in fact to have been paid is certainly a matter weighing against the proposition that Mr Androvics was working at the time.
14. It is not however in dispute that the Appellant's then husband was a 'qualified person' prior to the date of divorce. He was recognised as such by the Respondent and the Appellant herself was granted a residence card on that basis. Looking at the evidence in the round I have little doubt that the Appellant's husband was still working as an 'odd-job' man for Josam Services in January 2015. I bear in mind that Mr Abrahams and his accountants Coker Isah had absolutely no obligation towards the Appellant, and had nothing to gain from supplying her with the information that they did. They gave the information that they did - including letters of confirmation, P60 and payslips - in good faith. I have also found the Appellant herself to be a wholly credible witness, whose assertions about what her ex-husband was doing at that time are based on what she was told by mutual friends. I note in particular that Mr Androvic's P60 - generated by Josam Services - showed him to have paid £1260 in tax in the year to April 2014, and that his payslips are to the same effect in the following year. That was obviously money deducted from his paypacket. Whilst I accept Mr Harrison's suggestion that public policy would require unlawful work to ordinarily be excluded for the purpose of the Regulations, there is nothing before me to suggest that the work that Mr Androvics was doing - painting, decorating and gardening - was unlawful *per se*. He appears to have undertaken it in good faith that tax was being paid on his behalf. I bear in mind that tax could still be paid on those earnings. Given those factors I am satisfied that regardless of the efficiency of his employer or his employer's accountant, Mr Androvics was working at the date that he and the Appellant were divorced.
15. Mr Harrison was able to indicate, in light of the payslips, bank statements etc that were supplied that no issue is taken with the Appellant's claim to have been working throughout the relevant period and to date.

Decision

16. The appeal is allowed with reference to the Immigration (EEA) Regulations 2006. The Appellant has a retained right of residence.
17. There is no direction for anonymity.

Upper Tribunal Judge Bruce
29th December 2017