Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05335/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6th June 2019	**On 3rd July 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

VICTOR SAM BREW
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Ngwuocha of Carl Martin solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 13 June 2012, Mr Brew entered into a proxy marriage with Ms Sewaa, a citizen of the Netherlands. Divorce proceedings were commenced on 29th November 2015 and the marriage was dissolved on 15th January 2016. On 19 April 2018, Mr Brew made an application for a Residence Card as a former family member in accordance with regulation 10 Immigration (European Economic Area) Regulations 2016. The paragraphs relevant to this appeal are as follows:

> (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) The condition in this paragraph is that the person ("A")—
>
> (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
>
> (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
>
> (c) 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;
>
> (ii) …
>
> (iii) …
>
> (iv) …
>
> (6) The condition in this paragraph is that the person—
>
> (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or
>
> (b) …

2. There is no change in this Regulation to that which was in the 2006 Regulations. The application was refused by the respondent on the grounds that the respondent was not satisfied that the proxy marriage was valid, that Mr Brew had failed to provide evidence that Ms Sewaa was exercising Treaty Rights at the date of termination of the marriage or that Mr Brew had continued to exercise Treaty Rights since the termination of the marriage.

3. First-tier Tribunal Judge L K Gibbs found that the proxy marriage was genuine and properly performed, that the couple's marriage had lasted for at least three years, they had resided in the UK for at least one year during its duration and that Ms Sewaa was exercising Treaty Rights on the date the divorce proceedings were instituted. She thus found that Mr Brew was a family member as defined within regulation 7 and that he satisfied regulation 10(5)(a), (b) and (d)(i). The respondent did not seek permission to challenge either of these findings.

4. Mr Brew has not worked since 2012. The First-tier Tribunal judge found that he did not therefore meet regulation 10(6) and thus because he did not meet regulation 10 as required, she dismissed his appeal.

5. Permission to appeal was granted on the grounds that it was arguable the judge failed to consider *HS (EEA: revocation and retained rights) Syria* [2011] UKUT

00165 which, it was submitted, concluded that the EU directive did not require the non-EU national to show economic activity following divorce.

Error of Law

6. The headnote of *HS* reads as follows:

> "*1 Where the Secretary of State revokes a residence card before the expiry of its validity it falls on her to justify such revocation.*
>
> *2 Regulation 10 of Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that: a genuine marriage has lasted three years and the couple have spent one year together in the United Kingdom and that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member.*"

Mr Ngwuocha referred in particular to the following paragraphs:

> "39. Regulation 10 (5) and (6) of the EEA Regulations 2006 transposes these provisions into national law. It requires an applicant who has divorced to satisfy 10 (5)(a), (b), (c) and (d). Two of these provisions require particular attention:
>
> a. Regulation 10(5)(b) requires the applicant to show "he was residing in the United Kingdom in accordance with these Regulations *at the date of termination*". In simple terms this means that at the date of the termination of the marriage he was residing in the UK as the spouse of an EU national who was working at that date. This correctly identifies the focus as being on the spouse's status as a worker at the date of the divorce.
>
> b. Regulation 10(5) (c) requires the applicant to satisfy regulation 10(6). Regulation 10(6) imposes two conditions either one of which should be met: the 10(6)(a) requirement is that the non EEA national would be a worker, self employed or a self sufficient person if he were an EEA national. The alternative requirement is 10(6)(b) that the person is the family member of a person within paragraph (a).
>
> 40. If construed literally regulation 10(6) may give rise to problems. On divorce, a person ceases to be a family member by reason of marriage. That does not cause the right of residence to cease however as regulation 10(5)(a) makes plain. Family member with a retained right of residence in regulation 10 and regulation 14 (3) must be a term of art and mean a person who comes within regulation 10(2) to (5). Further a non EEA family member does not have to be economically active during the marriage and nor is there any indication in Article 13 of the Directive that they have to be economically active on their own account on termination of the marriage.
>
> 41. In Article 13 second paragraph of the Directive the reference to "the person concerned" is to the EEA national whose exercise of Treaty rights gives rise to a right of residence of the former family member and not the family members themselves. It is doubtful whether regulation 10 (6) adds to regulation 10 (5)(b) as we have construed it, as it is sufficient to be the former family member of a person who was working at the time of the divorce."

Mr Ngwuocha's essential submission was that *HS* made plain that there was no requirement for Mr Brew to have been working at the termination of his marriage; his application was not for permanent residence and that, contrary to Mr Kotas' submission, *Amos* [2011] EWCA Civ 552, was of no relevance to the decision to be taken in this appeal; *Amos* was concerned with an application for permanent residence.

7. HS' application was for a further residence card; according to paragraph 5 of *HS*, HS "believed he was entitled to permanent residence". The application was refused by the SSHD and the residence card revoked because he did "not qualify for permanent residence under retained right of residence." The Upper Tribunal determined that the question to be decided by them was "whether the appellant had a retained right of residence following his divorce" ([13] of *HS*) as well as the appeal against the revocation of an existing residence card and a first application for permanent residence ([15] of HS).

8. Paragraphs [33] to [47] of *HS* consider the issue of retained rights of residence. Of particular relevance are the following paragraphs:

> "34. In this case, the primary qualifying condition is that set out in Article 13(2)(a):
>
> "prior to the initiation of the divorce …. the marriage …. has lasted three years, including one year in the host Member State".
>
> …
>
> 35. The second sub paragraph of Article 13 of the Directive provides: "Before acquiring the right of permanent residence, the right of residence of the person concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or…...*or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements*……Such family members shall retain their right of residence exclusively on personal basis". (Our emphasis)
>
> 36. This language is quite compressed. Although it refers to "permanent residence" it must be discussing the retained right of residence rather than making an advance reference to the right of permanent residence addressed in Article 16 of the Directive. It may well be that the duration of what we shall call "indefinite residence" is permanent depending on the circumstances of its acquisition. Duration of Article 13 rights is, however, specifically addressed by Article 14, and entitlement to a permanent residence document on the basis of Article 13 (2) is considered in Article 18 (see paragraph [3] below[1]).
>
> 37. When considering whether a retained right of residence exists the person concerned must be the spouse of a former spouse who exercised the relevant Treaty right. The overall sense of this seems to be that in the case of a family member seeking to acquire a retained right of residence, such a person must show that the EU national remains a worker etc at the time that the right of residence is claimed to accrue (here the time of the divorce) and if so the family member (and in the case of death or divorce, former family members) has a personal right of retained residence.
>
> 38. Strictly, whether the wife was a worker is not the same as whether the wife was working at that time, as exemplified by Article 7 (3) of the Directive which provides that the status of a worker is retained if any temporary inability to work was through illness, accident, involuntary employment or relevant vocational training. This is not a relevant consideration in the present case, but it demonstrates the dangers of drawing inferences from gaps in wage slips alone.
>
> 39. Regulation 10 (5) and (6) of the EEA Regulations 2006 transposes these provisions into national law. It requires an applicant who has divorced to satisfy 10 (5)(a), (b), (c) and (d). Two of these provisions require particular attention:
>
> a. Regulation 10(5)(b) requires the applicant to show "he was residing in the United Kingdom in accordance with these Regulations at the date of termination". In simple terms this means that at the date of the termination of the marriage he was residing in the UK as the spouse

[1] This must be a typographical error and should refer to [52]

of an EU national who was working at that date. This correctly identifies the focus as being on the spouse's status as a worker at the date of the divorce.

b. Regulation 10(5) (c) requires the applicant to satisfy regulation 10(6). Regulation 10(6) imposes two conditions either one of which should be met: the 10(6)(a) requirement is that the non EEA national would be a worker, self employed or a self sufficient person if he were an EEA national. The alternative requirement is 10(6)(b) that the person is the family member of a person within paragraph (a).

40. If construed literally regulation 10(6) may give rise to problems. On divorce, a person ceases to be a family member by reason of marriage. That does not cause the right of residence to cease however as regulation 10(5)(a) makes plain. Family member with a retained right of residence in regulation 10 and regulation 14 (3) must be a term of art and mean a person who comes within regulation 10(2) to (5). Further a non EEA family member does not have to be economically active during the marriage and nor is there any indication in Article 13 of the Directive that they have to be economically active on their own account on termination of the marriage.

41. In Article 13 second paragraph of the Directive the reference to "the person concerned" is to the EEA national whose exercise of Treaty rights gives rise to a right of residence of the former family member and not the family members themselves. It is doubtful whether regulation 10 (6) adds to regulation 10 (5)(b) as we have construed it, as it is sufficient to be the former family member of a person who was working at the time of the divorce.

42. …

43. …

44. …

45. …

46. Third, it *[the SSHD]* sought evidence of the appellant's exercise of Treaty rights from the date of divorce to the date of the application. If this meant evidence of continuous employment we cannot see how such a requirement is consistent with EU law. If the appellant obtained a retained right of residence on divorce because of the duration of his marriage and his wife's status as a worker he did not lose it subsequently because he ceased to be employed or self-employed.

47. In brief, if the Secretary of State was asking for documents that it was not necessary to produce to demonstrate the retained right of residence and was imposing conditions that the appellant was not required to meet it cannot be a lawful conclusion that the appellant did not have the retained right of residence by reason of his failure to satisfy the Secretary of State. The appellant was required to demonstrate that he satisfied the requirements of regulation 10 to obtain such a right of residence and this he had done. …"

9. I was also referred, very briefly, to *Gauswami (retained right of residence: jobseekers) India* [2018] UKUT 275 (IAC). In this case, Ms Gauswami was not, it appears, employed at the date of initiation of the divorce proceedings but registered as a job seeker five days prior to the pronouncement of the decree absolute. The First-tier Tribunal judge in that case found that she had not discharged the burden of proof that as at the date of dissolution of her marriage she would fall within the terms of regulation 6 of the 2006 Regulations.

10. *Gauswami* considered the relevance of the date of divorce and the initiation of divorce proceedings in so far as it relates to retained rights of residence. Paragraphs 28 to 35 are relevant:

"28. In Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, Singh LJ observed that, in the light of the CJEU's judgment in NA v Secretary of State for the Home Department [2017] QB 109, the respondent now accepts that, in order to meet the condition in regulation 10(2)(a) to have been the family member of a qualified person (within the meaning of regulation 6), it was sufficient for the person asserting the retained right of residence to show that the EEA national spouse/partner was a qualified person as at the date of the initiation of divorce proceedings, rather than at the date of decree absolute. The Court of Appeal accordingly granted permission to appeal in the case before it and allowed the appeal by consent, since the Upper Tribunal had found that the date of decree absolute was the operative date for this purpose.

29. We are entirely satisfied that this development does not in any way affect the fact that the issue is whether the appellant retained a right of residence at the date of decree absolute. That is the point at which it becomes necessary to determine whether a right has been retained for the simple reason that it is at this point that the person concerned ceases to be a family member and so ceases to be able to rely on the EU spouse or partner for his or her right to reside under Articles 7 and 8 of the 2004 Directive. Unless the former family member retains a right of residence at that point under Article 13, he or she will have no rights under the Directive/Regulations.

30. Indeed, in Baigazieva, the date of decree absolute was acknowledged to be the point at which it became necessary to decide the issue. Plainly, it could not be earlier. As the Court noted, there is, however, a difference between the day by reference to which it is necessary to decide whether a right has been retained and the day or days by reference to which certain requirements must be met, in order to make that decision (paragraphs 14 and 15 of the judgment).

31. We are also satisfied that there is nothing in Baigazieva or the related CJEU judgment of NA to require us to conclude that the date for determining whether the appellant complied with the requirement to be a worker must be the date on which divorce proceedings were commenced. As we shall see, it would be very unfair on the appellant and others in her position if that were the position.

32. The tenses used in regulation 10(5) and (6) are significant. Regulation 10(5)(a) and (b) are in the past tense, whereas regulation 10(6) and regulation 10(5)(c), which introduces sub-paragraph (6), are in the present tense.

33. In order to understand the significance of this, one needs to refer to the text of Article 14. Article 14.2 (a), (b), (c) and (d) set out requirements to be met in order to retain the right of residence. These requirements are essentially backward-looking in nature. So too, as we now know, is the requirement regarding the status of the qualified person.

34. By contrast, the paragraph that follows sub-paragraph (d) ("Before acquiring the right of permanent residence …") is of a present or ongoing nature. This is because a person who retains the right of residence has to be a worker/self-employed/self-sufficient and insured person (or a family member of such a person) at all times up to the point that he or she acquires the right of permanent residence; that is to say, acquires a right that is no longer retained from a previous relationship with a relevant EU citizen. In short, the meaning of the words "Before acquiring …" would perhaps be better conveyed in English by saying "Until the right of permanent residence has been acquired …".

35. Regulation 10(6) is how the United Kingdom has decided to give domestic legislative effect to that paragraph in Article 14. As will be seen, we conclude that regulation 10(6) does not give proper or at least sufficiently clear effect to that Article, so far as concerns what is meant by being a "worker". But, so far as its temporal aspect is concerned, regulation 10(6) is entirely right. So far as the appellant is concerned, the requirements of that provision must be satisfied both on and after the date of the decree absolute."

11. Mr Kotas submitted that *Amos* was a complete answer to Mr Ngwuocha's submissions. The relevant paragraphs relied upon were as follows:

> "25. Article 13 provides for the "retention of the right of residence" on divorce. Although it does not expressly confer an independent right of residence, the same language is used in Article 12. Article 12 envisages that a widow or widower may acquire the right of permanent residence, provided she or he is a worker, etc. It is obvious that the Directive cannot be interpreted as requiring the widow or widower, in order to retain the right of residence, to show that her or his deceased spouse continues to work. The same must apply to Article 13. Indeed, I read Mr Eicke as having accepted this, in paragraph 29 of his skeleton. It follows that I do not agree that the appellants were required to show that their former spouses were working for a continuous period of 5 years prior to their applications for the right of permanent residence. In my judgment, therefore, *OA* was incorrectly decided.
>
> 26. If, immediately before divorce, the requirements of Article 7.2 are satisfied, the non-national must then satisfy the requirements of Article 13.2. The relevant requirements in the present cases are, first, that:
>
> > "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."
>
> 27. The right of permanent residence sought by the appellants is subject to the further requirement of the penultimate paragraph of Article 13.2:
>
> > "Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4)."
>
> 28. Article 18 is also pertinent. It confers a right of permanent residence on a divorced non-national, to whom Article 12(2) or 13(2) applies, after 5 years' legal residence. It does not require the non-national to have lived "with" the EEA national during that period. (Again, this is obvious in an Article 12(2) case, since the national spouse has died.)
>
> 29. Thus the requirements of the Directive applicable to the appellants were as follows:
>
> > (1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).
> >
> > (2) Their marriages had to have lasted at least three years, including one year in this country.
> >
> > (3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2.
>
> 30. The Regulations are consistent with these propositions. Regulation 10(5) provides that a "family member who has retained the right of residence" must in a case such as the present appeals satisfy the following conditions:
>
> > (a) His or her divorce from the EEA national.
> >
> > (b) He or she was residing in the UK in accordance with the Regulations at the date of the divorce. He or she will have been so residing if regulation 14 applied, i.e. if the EEA national spouse was a "qualified

person", i.e., for present purposes, a worker or self-employed person (as to which see the definitions in regulations 2 and 6).

(c) He or she is a worker or self-employed person, and therefore satisfies paragraph (6).

(d) 3 years' marriage, including at least one year's residence in the UK.

31. Provided these conditions continue to be satisfied, after 5 years' continuous residence in the UK a non-EEA national will be entitled to a permanent right of residence under regulation 15(1)(f)."

Discussion

12. It is correct that *Amos* was concerned with applications for permanent residence. The Court of Appeal found that, in Mr Amos' case, the focus of the Upper Tribunal had been on whether Mr Amos' former wife had worked for a continuous period of five years before his application for permanent residence, and did not make the necessary findings of fact as to whether Mr Amos satisfied the conditions referred to in paragraph 30 of *Amos*. The decision in his case was set aside and remitted for a fresh hearing (paragraph 33).

13. The case of Ms Theophilius did not raise that issue but rather procedural matters which are not relevant in this appeal.

14. The Court of Appeal heard *Amos* on 31st March 2011and judgment was handed down on 12th May 2011. *HS* was determined on 13th April 2011; it does not appear that *Amos,* whilst pending, was brought to the attention of the Upper Tribunal. It does not appear that either *HS* or *Amos* were brought to the attention of the Upper Tribunal in *Gauswami*.

15. *HS* and *Amos* were decided before it was established that the relevant date in determining retained rights of residence was the date of initiation of divorce proceedings, not the date of divorce. The nuanced and detailed approach in *Gauswami* examining the language used in the Regulations, and in particular regulation 10(6), as reflective of the Directive was not undertaken in *HS* and *Amos* and was not, in those cases necessary.

16. In this case, Mr Brew is not and has not worked or sought employment, it seems, whilst he has been in the UK. His initial application for a residence card was refused in accordance with *Kareem (Proxy marriages: EU law)* [2014] UKUT 24 (IAC). In *Awuku* [2017] EWCA Civ 178 (judgment on 23 March 2017) the Court of Appeal determined that *Kareem* had been wrongly decided. By this time however Mr Brew's marriage had broken down and he was divorced.

17. In the instant appeal, the First-tier Tribunal judge found that Mr Brew met the criteria in regulation 10 as having a retained right of residence save for regulation 10(6). Mr Brew was not applying for permanent residence and does not submit that he is so entitled – he has not been and is not a worker such as would meet the definition in regulation 6, if he were an EU national.

18. Mr Brew was divorced on 15th January 2016. It is on that date that it becomes necessary to determine whether a right has been retained for the simple reason that it is at that point that he ceased to be a family member and so ceases to be

able to rely on the EU spouse for his right to reside – see [29] and [30] of *Gauswami* above. Mr Kotas submitted that there was a tension between *Amos* and *HS*. But neither *HS* nor *Amos* specifically addressed this issue, it not being submitted in either of those cases that the initiation of divorce proceedings was the relevant date under which regulation (10)(5)(d) should be considered.

19. The analysis to determine whether a person who is lawfully married or in a civil partnership has a retained right of residence under regulation 10(5) Immigration (European Economic Area) Regulations 2016 such as to entitle them to the issue of a residence card is a two stage process: firstly to consider whether the individual meets the criteria, other than regulation 10(6), on the date of *initiation* of divorce proceedings and then, on the *date of divorce* at which point he ceases to be a family member, whether he meets the criteria in regulation 10(6).

20. Although Mr Brew, it seems, did not work, or seek work, because of an incorrect interpretation of the Regulations as regards his proxy marriage, he is in the unfortunate position that as at the relevant date, the date of his divorce, he did not meet the requirements of regulation 10(6) of the 2016 Regulations which properly reflect Article 13 of the Directive.

21. It follows that the decision of the First-tier Tribunal that Mr Brew did not meet the criteria in the Regulations was correct. I find there is no error of law in the decision by the First-tier Tribunal judge such that the decision is to be set aside to be remade.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision; the decision of the First-tier Tribunal stands.

Date 2nd July 2019

Upper Tribunal Judge Coker