Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06309/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2019	**On 28 November 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

JACQUELINE AMANFO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Antwi-Bosiako of R Spio Solicitors
For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. On 12 September 2019, I issued a decision in which I concluded that the First-tier Tribunal (Judge Juss) had erred materially in law in dismissing the appellant's appeal against the respondent's refusal of a Permanent Residence Card. I do not propose to rehearse the reasons why I came to that conclusion. It suffices for present purposes to record that I set the decision of the FtT aside and directed that the appeal should be remade in the Upper Tribunal de novo.

Background

2. The appellant's date of entry to the UK is unclear. In her application for a Permanent Residence Card, she stated that she had met a Belgian national named Benjamin Ofosy Asante at a party in London on 1 February 2008. A relationship had developed and they married (by proxy, in Ghana) on 20 February 2010. They cohabited at an address in Hertfordshire from 14 February 2009 to 1 September 2011 and at the appellant's address in Borehamwood thereafter. They separated and were eventually divorced by the pronouncement of a Decree Absolute at the Family Court at Watford on 5 August 2015.

3. The appellant was granted a Residence Card as Mr Asante's family member on 12 January 2011. That card was valid for the required five year period. On 6 June 2018, she applied for a PRC. She provided the details above and stated that the sponsor had worked in the UK since 2009 and that she had been employed at all material times. It was submitted that she was entitled to PR and to a card confirming that right.

The Respondent's Decision

4. The respondent refused the application on 23 August 2018. It was accepted that the appellant's marriage to Mr Asante was dissolved on 5 August 2015. It was accepted that they had been married for more than three years and that for at least one year they had lived in the United Kingdom. It was also accepted that the appellant had herself been working in the UK at the date on which the marriage was terminated. It was not accepted, however, that Mr Asante had been exercising Treaty Rights when the divorce proceedings were initiated (which was said to be in June 2015). Evidence had been submitted to show that he worked at a restaurant called Taste of Africa but interdepartmental checks disclosed no evidence of any such work. An HMRC print out which had been submitted with the application referred to an employer called Atlas Cleaning but the record showed no end date for that employment. The interdepartmental checks confirmed that the sponsor exercised Treaty Rights from 2010 or 2011 to 30 November 2014 but there was no record of economic activity thereafter. It was not accepted, in the circumstances, that the EA national had been exercising Treaty Rights in June 2015, at which point divorce proceedings were initiated. It was not accepted that the appellant had retained a right to reside under regulation 10, or that she had acquired a right to reside permanently in the UK thereafter, under regulation 15(1)(f).

Documentary Evidence

5. In addition to the bundles which were filed and served for the hearing before the First-tier Tribunal, the respondent relied upon a witness statement made by Ian Lewis of HMRC on 11 October 2019, detailing that

department's records of Mr Asante's economic activity in the United Kingdom from 2009-2017.

Oral Evidence

6. The appellant confirmed before me that she had made a statement in March 2019 and that she was aware of its contents, which were true. Mr Antwi-Bosiako asked the appellant whether her husband had been earning money from work at Atlas Cleaning Services in 2011 and 2014. She said that he was. She also stated that he had been receiving earnings from a company called Iridium despite what was said in the HMRC documents.

7. Cross-examined by Ms Isherwood, the appellant stated that she had last seen her husband four years ago. She corrected herself to say that she had not seen him physically at that point but had spoken to him on the telephone. He had moved out of their property when the relationship broke down and she had not seen him after that point in 2015. She was unable to give an exact date although she thought that it had been around February that year. They had separated acrimoniously (she confirmed to me that she understood the meaning of that word). It had been difficult from 2013 onwards. Although they had separated acrimoniously, the appellant's ex-husband had agreed to help her with documents to support her claim under the EEA Regulations through a friend, although there was no evidence from the friend to confirm this role.

8. Ms Isherwood asked the appellant how she knew if her ex-husband was working in the UK from 2013 onwards. She said that they were still using the same address and that the person her husband was seeing (romantically) used to come to that address, so she (the appellant) had moved out for a while so that the situation could calm down a little. Ms Isherwood suggested to the appellant that she could not have known if her ex-husband was working or not if she was not even living with him. The appellant stated that she had just moved out for a short period. The appellant stated that she had moved out in August 2014 and she had done so because her ex-husband was violent towards her. She had moved out for only two weeks and had returned in August or September that year. She had returned to the house and had seen a payslip although she had not seen the detail on that document. She was not aware of any reason why her husband had not been working. She said that his employer had failed to notify HMRC of her husband's earnings. It was clear to her that he had been working; he had in fact been doing jobs in the day and at night-time. He used to work at Asda and then at his security job. Sometimes he did not even come home. She was unable to state what roles her husband had been undertaking beyond 2015 as he had moved out at that point. Ms Isherwood noted that HMRC records appeared to show that Mr Asante was working for Asda until 22 May 2012 but she maintained that he was still working for Asda when they lived together.

She then changed her evidence to say that she would not know who he was working for because she was 'getting the silent treatment'. He had definitely been working for Asda in 2013, however, because they would go shopping there are would go to the canteen together. She did not know where he was working in 2014 and in 2015 their communication had broken down.

9. I asked the appellant to clarify her evidence about the document to which Ms Isherwood had referred, which tended to suggest that her ex-husband had stopped working for Asda in 2012. She said that he was definitely working as a security guard at that time and that he had definitely been working at Asda in 2013.

10. There was no re-examination from Mr Antwi-Bosiako.

Submissions

11. In submissions, Ms Isherwood said that the appellant had not been a credible witness. She had a clear lack of knowledge about her ex-husband's economic activity. There was no evidence to show that Mr Asante's employers had been at fault in failing to pay his tax. The evidence showed quite clearly that Mr Asante was not in receipt of an income between 2013 and 2014. There was no possibility of the appellant retaining a right to reside in the UK.

12. Mr Antwi-Bosiako submitted that the appellant had been forthright and honest and that her evidence should be accepted insofar as it was suggested that her ex-husband had been working day and night in 2013. The appellant's evidence should be preferred to the records retained by Asda Stores and communicated to HMRC in relation to his employment there. There were clear inaccuracies in the history given by HMRC. It was open to the Tribunal to accept the appellant's evidence. If it was found by the Tribunal that the evidence did not show economic activity throughout the requisite period, such gaps were permitted by the Directive and the Regulations. Mr Antwi-Bosiako submitted that regulation 3 or regulation 5(4) could come to the appellant's aid in this respect. It would also be open to the Tribunal to conclude that he was a jobseeker during any gap. I suggested to Mr Antwi-Bosiako that none of these exceptions appeared to apply to the appellant's case. He accepted that none applied 'on the letter of the Regulations' but he was trying, he said, to draw analogies. In any event, Mr Antwi-Bosiako submitted that there was some documentary evidence to show that the appellant's ex-husband was working in 2015. There were payslips which appeared in the bundle. If these were accepted, they were highly material to the question of whether the appellant had retained a right to reside in the UK upon divorce.

13. I reserved my decision.

Analysis

14. It is for the appellant to establish on the civil standard that she is entitled either to a retained right to reside in the United Kingdom or that she has a right to reside in this country permanently under the Citizens Directive.

15. The concern which prompted me to set aside the decision of the First-tier was that it had failed to consider whether the appellant's ex-husband had acquired the right to reside permanently in the UK under regulation 15(1)(a), since any such conclusion would potentially be material to the appellant's own position. Regulation 15(1)(a) provides that "an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years" shall acquire the right to reside in the United Kingdom permanently.

16. HMRC's records of Mr Asante's economic activity in the United Kingdom are presented as a table in Mr Lewis's witness statement. That table is as follows:

Tax Year	**Employers Name/Income From**	**Gross Pay/Income**	**Tax Deducted**
2009-2010	Crystal Services Ltd	£1020.00	£0.00
	Asda Stores Ltd	£3918.32	£360
	Advanced Facilities Cleaning Management Services Ltd	£960	£0.00
	Atlas Cleaning Ltd Hanworth	£1200	£0.00
	Mitie Cleaning (South West) Ltd	£540	£0.00
	E901 Realisations Ltd	£8204.51	£768.60
2010-2011	Atlas Cleaning Ltd Hanworth	£3744.00	£0.00
	Asda Stores Ltd	£15899.31	£1881.80
2011-2012	Atlas Cleaning Ltd Hanworth	£3294.08	£0.00
	Asda Stores Ltd	£11825.75	£1451.20
	Securitas Security Services (UK)	£4068.75	£813.60
2012-2013	Atlas Cleaning Ltd Hanworth	£3194.74	£0.00
	Asda Stores Ltd	£942.78	£0.00
	Securitas Security Services (UK)	£10250.63	£2050
2013-2014	Iridium 2005 Limited	£0.00	£0.00
	Atlas Cleaning Ltd Hanworth	£0.00	£0.00

2014-2015	Iridium 2005 Limited	£0.00	£0.00
2015-2016	No employment record held		
2016-2017	No employment record held		

17. There is also a letter containing HMRC records in respect of Mr Asante. That letter, dated 11 February 2015, was submitted in support of the original application. It provides a little more detail in respect of the years 2010 to 2014. It also provides the following data in respect of the tax year ending 5 April 2009:

Employer	Reference	Start date	End date	Pay	Tax	Tax code
Crystal Services Ltd	961/9912802	11/02/2009	11/02/2009	£480	£0.00	603L
E901 Realisations Ltd	419/EZ63691	23/02/2009	02/12/2009	£979	£0.00	603L
Mitie Cleaning (South West) Ltd	034/M2246	15/02/2009	27/03/2009	£690	£0.00	603LX
Adecco UK Ltd	951/AD220	20/12/2008	27/02/2009	£177	£35.40	BRX

18. These tables show that the appellant's ex-husband was economically active in the United Kingdom from 20 December 2008 to April 2013. It suggests that he was not economically active in this country beyond April 2013, from which point he is not recorded to have earned any money or paid any tax. There was no basis for the respondent to conclude, as she did in the letter of refusal, that Mr Asante exercised Treaty Rights in the United Kingdom until 30 November 2014. That error appears to have arisen, as I noted in my earlier decision, from the fact that the expanded version of the table above – which was submitted in support of the original application – states that the end date of Mr Asante's employment with Iridium 2005 Ltd was stated to be "30/11/2014". He is not recorded to have earned any money for that company, however, and merely being registered with an employer will not suffice.

19. The appellant submits that the HMRC records do not reflect the true position. She submits that her ex-husband continued working in this country, at least until the point at which they separated in 2015. If that is

established to be the case, it would show that he had acquired Permanent Residence on 20 December 2013.

20. The evidential basis upon which Mr Antwi-Bosiako submits that the appellant's ex-husband worked beyond the point suggested by the HMRC records is as follows. There is a letter from a restaurant in Nottingham called Taste of Africa, enclosing copies of payslips from April 2015 to November 2015. These show, or purportedly show, that Mr Asante earned £816 in each of these months, for 96 hours of work at £8.50 per hour. The payslips show his National Insurance number and give sums on which tax and NI was payable. In respect of the period between April 2013 and April 2015, however, there is no documentary evidence of economic activity on the part of Mr Asante. Mr Antwi-Bosiako is dependent, for this period, on the oral evidence of the appellant alone.

21. In respect of the period between April 2013 and April 2015, my finding is as follows. In circumstances in which HMRC have no record of economic activity beyond that point, I do not accept that the appellant's oral evidence suffices to discharge the burden of proving that her ex-husband was economically active in this period. She said that he would always go out to work until they split up in 2015 but the documentary evidence before me simply does not support that assertion. Her evidence of where he worked and who he worked for was rather vague. That is perhaps unsurprising if, as she maintains, their relationship was strained between 2013 and 2015, but the burden remains on the appellant and she has provided no proper basis – whether in her documentary evidence or her oral evidence – on which to found a conclusion that Mr Asante remained economically active beyond the end-point noted in the HMRC material. Whilst I am content to accept, therefore, that he was economically active between 20 December 2008 and the end of the tax year in 2013, that leaves him some months shy of accruing the five years residence in accordance with the regulations which is required.

22. Undeterred, Mr Antwi-Bosiako submitted that there were various means by which he could nevertheless show that the appellant's ex-husband should be taken to have continued exercising his Treaty Rights in the United Kingdom up to and including 20 December 2013, at which point he would have acquired a right to reside permanently in the UK. He submitted that Mr Asante was a jobseeker during between April 2013 and December 2013. Leaving to one side the fact that this submission was contrary to his primary case and the evidence given by his client, the fact remains that there is no evidence to show either that he was seeking work during that time, or that he was registered as such, or that he had a genuine chance of being engaged during that time. On the evidence before me, he was not conceivably a jobseeker as defined.

23. Mr Antwi-Bosiako also submitted that regulation 3 (Continuity of Residence) somehow applied in order to bridge this eight-month gap. As I

suggested to him at the hearing, however, that regulation concerns temporary absences from the UK, not absence of evidence of economic activity. Mr Antwi-Bosiako then went to regulation 5(4), which concerns those who are working in another EEA state. There is no evidence in this case that Mr Asante ever left the UK to work in another EEA state and that submission is directly contrary to the appellant's account. Recognising the problems with these submissions, Mr Antwi-Bosiako accepted that none of these provisions applied directly. He submitted that they apply by analogy to the appellant's circumstances, however. That cannot be right. The Directive and the Regulations contain a scheme of rights and protections which apply to individuals in the circumstances therein described. There is no vague penumbra of the kind relied upon by Mr Antwi-Bosiako, and he was unable to develop this submission with reference to any domestic authority or jurisprudence from the CJEU.

24. Drawing these threads together, I come to the clear conclusion that the appellant cannot establish that her ex-husband acquired a right to reside permanently in the UK between 2008 and 2013. The importance of that finding is that the appellant cannot establish, as was submitted by Mr Antwi-Bosiako, that she acquired a right to reside permanently in the UK under regulation 15(1)(b). That is because she cannot show that she resided in the UK with an EEA national in accordance with the Regulations for a continuous period of five years. They married in February 2010 and lived together in the UK in accordance with the Regulations until the end of the tax year in 2013 but she did not, on the facts as I have found them, continue to accrue qualifying residence beyond that point. Insofar as the appellant relied on regulation 15(1)(b), therefore, her appeal must be dismissed.

25. That leaves the submission that the appellant retained a right to reside in the UK under regulation 10(5) upon divorce and that she qualified for permanent residence as a result of regulation 15(1(f). It has been accepted throughout that regulation 10(6) is satisfied. It is clear that the appellant herself is a hard-working woman who has made a contribution to the UK economy. The material questions are instead those posed by regulation 10(5)(a) and (b) of the Regulations, read alonside Baigazieva [2018] EWCA Civ 1088; [2018] Imm AR 1221.

26. It is therefore necessary to consider the appellant's evidence that her ex-husband was working in 2015. To recap, it is said that their relationship broke down at the start of that year (possibly February), the petition for divorce was presented on 6 March 2015 and the marriage was divorced by the pronouncement of a decree absolute on 5 August 2015. There is no adequate evidence, as I have already explained, to show that the appellant's ex-husband was economically active in March 2015. The HMRC records show no economic activity at that point. The appellant's own evidence is vague and unsatisfactory on the point. The evidence

from Taste of Africa restaurant purportedly shows that the appellant's ex-husband was paid for work in the months April 2015 to December 2015, and not before. I conclude, therefore, that Mr Asante was not economically active and was not a qualified person in the UK when divorce proceedings were initiated.

27. Nor do I accept, in any event, that the records from Taste of Africa restaurant in Nottingham suffice to establish on the civil standard that Mr Asante was working in 2015. There is no record of any such employment held by HMRC. There is merely a bare assertion that his employment was not reported to HMRC and that no tax or NI was paid in respect of his employment but that is a serious allegation against the claimed employer and there is nothing before me to show that it has been put to the claimed employer or raised with HMRC. The appellant maintains that she was able to secure this evidence by engaging the assistance of a mutual friend but there is no evidence from that person, confirming the provenance of the payslips and the covering letter. The letter and the payslips stand alone and are at odds with the records kept by HMRC. For all of these reasons, I do not consider the documents from Taste of Africa restaurant to be reliable evidence that Mr Asante was working in the United Kingdom in 2015, at any point during the divorce proceedings between him and the appellant.

28. It follows that Mr Asante was not a qualified person and that he and the appellant were not residing in the United Kingdom in accordance with the Regulations at any point in 2015. She did not, in those circumstances, retain a right to reside in the UK upon her divorce from him. She cannot satisfy regulation 10(5) and she cannot, as a result, satisfy regulation 15(1)(f).

29. In the circumstances, I come to the clear conclusion that the appellant does not have a retained right to reside in the UK or a right to reside permanently in the UK. Her appeal will be dismissed accordingly.

Notice of Decision

I remake the decision on the appeal, dismissing it under the Immigration (EEA) Regulations 2016. There is no reason for anonymity.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

14 February 2020