



Upper Tribunal
EA/00318/2019
(Immigration and Asylum Chamber)

Appeal Number:

THE IMMIGRATION ACTS

Heard at Edinburgh
on 30 January 2020

Decision & Reasons
Promulgated
on 5 February 2020

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JESSICA LORENA RUALES ALCUSIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aslam, of McGlashan MacKay, Solicitors

For the Respondent: Mr Clark, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ecuador, born on 21 September 1988. She applied for a permanent residence card in terms of the Immigration (EEA) Regulations 2016, based on a retained right of residence following separation from her former EEA sponsor.

2. The respondent refused her application by a letter dated 4 January 2019, giving several reasons.
3. FtT Judge Sorrell dismissed the appellant's appeal for reasons given in her decision promulgated on 12 June 2019.
4. The appellant applied for permission to appeal to the UT on 26 June 2019. FtT Judge Chohan granted permission on 7 November 2019.
5. Mr Aslam did not seek to pursue those aspects of the grounds going to the position of the children, the European Charter and sickness insurance. He relied only on the grounds based on the respondent's policy, cited at [8] of the grounds, on the difficulties which victims of domestic violence may face in producing evidence. He termed this as a "lowered burden". He submitted that in finding a lack of evidence of the exercise of treaty rights, the FtT failed to apply that approach. The evidence might have left it unclear whether the appellant's husband had spent the necessary period in the UK, but it was capable of yielding an inference that he had, and the FtT should have so found. His last known whereabouts were in Spain, but that did not necessarily mean that he had returned there permanently.
6. The respondent's decision is firstly based on the appellant not being divorced, and therefore not meeting the terms of regulation 10. Mr Aslam accepted that this was a difficulty, but suggested that the application might have been granted under some other part of the regulations.
7. Mr Govan submitted that the case could not have succeeded on any view of the evidence before the FtT.
8. I reserved my decision.
9. There are cases where the respondent, or the FtT, should discern that an application made in one category succeeds in another; but this is not such a case.
10. The appellant explicitly on her application form and in the covering letter from her solicitors asked for a residence card in a category based on her being divorced. She was not divorced. At no stage of proceedings has she explained how her appeal might overcome that obvious point.
11. Even if she had evidence by which she might have succeeded in another category (which is doubtful) it was not incumbent on the respondent or the FtT to identify that, contrary to her express representations; and she has no relevant ground of appeal to the UT. (She is still not divorced.)
12. There was a plain absence of evidence that the appellant's spouse had exercised treaty rights for at least 5 years; and the respondent had not been asked to make enquiry, or to take a generous view of the evidence.
13. It has not been shown that the FtT erred on any point of law.

14. Further, the respondent is correct in submitting that there was no evidence by which the appeal might sensibly have been allowed.
15. The appellant has leave to remain. Although there are advantages in obtaining a residence card, any route lies by way of an accurate application to the respondent, supported by such evidence as the appellant can reasonably obtain, and supplemented, if appropriate, by an approach to the respondent to make further enquiries.
16. The decision of the First-tier Tribunal shall stand.
17. No anonymity direction has been requested or made.

A handwritten signature in black ink, appearing to read 'Hugh Macleman'. The signature is written in a cursive style with a large, stylized initial 'H'.

31 January 2020
UT Judge Macleman